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IN THE

Supreme Court of the United States

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SHELDON E. HOCHBERG
Counsel of Record
ERIC C. EMERSON
CHARLES G. COLE
MICHAEL A. VATIS
JOHN P. NOLAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners USEC Inc. and United States Enrichment Corporation

212923

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The antidumping law allows for duties to be imposed on "foreign merchandise . . . sold in the United States at less than its fair value." The Commerce Department construed that phrase as including transactions in which a U.S. customer furnishes cash and fungible raw material to a foreign producer and receives a substantially transformed finished product. The question presented in this case is whether the Federal Circuit erred in failing to accord *Chevron* deference to that construction, when a contrary one will prevent the Commerce Department from applying the antidumping law to imports causing or threatening material injury to a domestic industry.

RULE 29.6 STATEMENT

USEC Inc. owns 100% of the stock of United States Enrichment Corporation. USEC Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. USEC Inc. is a publicly held company whose stock is traded on the New York Stock Exchange under the symbol "USU".

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USEC Inc. and United States Enrichment Corporation (collectively "USEC") respectfully petition for a writ of certiorari to review the judgment of the Federal Circuit in this case.

OPINIONS BELOW

The final judgment of the court of appeals is reported at 506 F.3d 1051. (App. 31a).

The question presented by this petition was raised and decided on interlocutory appeal; the court of appeals' judgment on interlocutory appeal is reported at 411 F.3d 1355 (App. 1a), affirmed on rehearing at 423 F.3d 1275 (App. 24a). The decision of the U.S. Court of International Trade from which interlocutory appeal was taken is reported at 281 F. Supp. 2d 1334 (App. 268a). The Department of Commerce's original determination is reported at 66 Fed. Reg. 65,877, (App. 41a), and its redetermination following initial judicial review, (App. 147a), is available at http://ia.ita.doc.gov/remands/03-34.pdf.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2007. Extensions of the time for filing a petition for writ of certiorari were granted by Chief Justice Roberts on December 11, 2007, and January 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1673 of Title 19, U.S. Code (2000), provides in relevant part that:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

STATEMENT OF THE CASE

At issue is a fundamental question with regard to the scope of the antidumping law of the United States: whether the Commerce Department can reasonably determine that imported foreign merchandise has been "sold" within the meaning of that law where a foreign producer receives fungible raw material and cash from a U.S. customer and delivers a substantially transformed finished product.

Based on the totality of the circumstances, the Commerce Department concluded that the transactions in this case—involving low enriched uranium—constituted sales of merchandise under the antidumping law. Because the transactions were found to have taken place at dumped prices and to have injured a U.S. industry, the Department imposed off-setting duties. The Federal Circuit, however, reversed Commerce's determination, concluding that the transactions involved sales of services outside the scope of the antidumping law. It relied on its own interpretation of certain provisions of the contracts as creating a continuous chain of title in the buyer to the raw materials and finished product. The court's decision was subsequently implemented so as to exclude imports made pursuant to such contracts from the scope of the antidumping order.

The Federal Circuit's decision was clearly improper under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as it usurped the Commerce Department's authority to interpret and apply ambiguous terms in a statute the Department is responsible for administering. By giving conclusive

effect to the contract terms drafted by the foreign producer and U.S. customer, and ignoring the circumstances of the transactions and the purposes of the antidumping law, the decision undermines the ability of the Commerce Department to fulfill its statutory mission of protecting U.S. industries from unfairly priced imports. At the same time, the decision threatens a historic disarmament agreement between the United States and Russia. This agreement uses the U.S. commercial nuclear fuel market as a channel to facilitate the conversion of nuclear weapons of the former Soviet Union to peaceful use—an objective that will be jeopardized if that market is disrupted by unfairly priced imports of enriched uranium. Such market disruption would also threaten the viability of the sole remaining domestic uranium enrichment facility, as well as a project to build a new enrichment facility employing a more advanced enrichment technology, both of which utilize the only U.S. enrichment technologies available to meet U.S. defense needs.

Thus, the Federal Circuit's decision—indefensible under *Chevron*—has enormous implications for both the scope of the antidumping law and U.S. energy security and non-proliferation objectives.

I. STATUTORY BACKGROUND

"Dumping" describes the practice of international price discrimination whereby a producer or exporter sells its merchandise in an export market at less than fair value. The U.S. antidumping regulatory framework is embodied in the Tariff Act of 1930, as amended. The Tariff Act defines "dumping" as "the sale or likely sale

of goods at less than fair value," 19 U.S.C. § 1677(34) (2000).[1] The Act provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that merchandise. *Id.* § 1673.

The Department of Commerce and the United States International Trade Commission are jointly responsible for administering the antidumping law. Commerce determines whether foreign merchandise is being sold in the United States at less than its fair value, *id.* §§ 1673(1), 1677(1), and the Commission determines whether a domestic industry producing a product "like" the imported merchandise has been materially injured or threatened with material injury. *Id.* § 1673(2). Upon the filing of a petition by an affected domestic industry, both agencies conduct their own investigations, and if both agencies make affirmative final determinations, Commerce will issue an antidumping duty order. *Id.* § 1673d(c)(1).

In its investigation, Commerce calculates a dumping margin based on the "normal value," which is generally determined by reference to the prices at which the producer or exporter sells the same goods in its home market or in third-country markets. The dumping margin is the amount by which the normal value exceeds the U.S. price of the subject merchandise. *Id.* § 1677b. Importers of merchandise subject to antidumping duty orders must then pay cash deposits in the amount of this dumping margin in order to enter that merchandise into the United States.

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1. Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

Id. § 1673e(a)(3). The actual amount of duty owed on particular imports is determined retrospectively through administrative reviews that may be requested on an annual basis. *Id.* § 1675(a)(1).

II. FACTUAL BACKGROUND

Nuclear power plants generate approximately 20% of the electricity consumed in the United States each year. The fuel for these plants is fabricated from low enriched uranium ("LEU"), which typically is produced through a process of enrichment. Enrichment involves increasing the level of fissionable U_{235} from 0.711% (the percentage by weight found in natural uranium) to levels that will sustain a chain reaction needed to generate electricity (generally 3-5%). Uranium in which the U_{235} content has been enriched to a level of 20% or more is weapons-grade material and is referred to as "highly enriched uranium" or "HEU."

The United States has only one plant in operation that produces LEU for nuclear fuel. This plant is owned by the U.S. government and operated by USEC pursuant to a lease entered into under the terms of the USEC Privatization Act of 1996, 42 U.S.C. § 2297h.

Companies that produce LEU such as USEC and the French company in this case, Eurodif S.A., are called "enrichers." Transactions between enrichers and their utility customers generally involve one of two types of contracts: "EUP" contracts (or "enriched uranium product" contracts) or "SWU" contracts ("separative work unit" contracts). There is no difference in the LEU that is produced and delivered to the customer in the two transactions.

In an EUP transaction, the utility contracts for the delivery of LEU and pays a cash price that covers the entire value of the LEU. There is no dispute that LEU imports pursuant to EUP contracts involve sales of merchandise subject to the antidumping law.

In a SWU transaction, the utility also contracts for the delivery of LEU, but pays cash and delivers raw material (natural, or "unenriched," uranium) to the enricher. There is no requirement in the contract that the LEU be produced from the unenriched uranium delivered by the customer. Because of the nature of the production process[2] and the fact that natural uranium is fungible and is not physically segregated by the enricher according to who supplied it, the LEU delivered to a customer is not produced from the batch of natural uranium delivered by that customer. Enrichers continuously produce LEU from their fungible inventory of unenriched uranium, and the LEU delivered by an enricher may have been produced even before the utility provided any natural uranium pursuant to its contract or even before the order for the LEU was placed. App. 49a, 219a.

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2. Both USEC and Eurodif use the gaseous diffusion method for producing LEU. Their plants are among the largest industrial plants in the world. The gaseous diffusion process involves continuously forcing and recycling uranium hexafluoride gas under pressure through more than 1,000 cascades, each of which contains porous membranes or diaphragms. As U_{235} molecules are lighter than the U_{238} molecules that are also contained in uranium as it comes out of the ground, the process results in two streams of gas, one slightly enriched in U_{235} and one that is somewhat depleted in U_{235}. *See* World Nuclear Ass'n, Information Paper: Uranium Enrichment (Oct. 2007), http://www.world-nuclear.org/info/inf28.html.

III. THE PROCEEDINGS BELOW

A. The Commerce Proceedings

On December 21, 2001, following a year-long antidumping investigation, Commerce published a notice of final determination regarding LEU from France. *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't of Commerce Dec. 21, 2001) (App. 41a), *as amended*, 67 Fed. Reg. 6,680 (Dep't of Commerce Feb. 13, 2002) (App. 90a) (collectively "Final Determination"). In its Final Determination, the Department found that LEU from France was being sold, or was likely to be sold, in the United States at less than fair value. In addition, the U.S. International Trade Commission determined that the domestic uranium enrichment industry was being injured or was likely to be injured by the foreign imports. As a result of these determinations, Commerce issued an antidumping duty order with regard to imports of French LEU. The Department calculated an antidumping duty rate of 19.95 percent.[3]

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3. At the same time Commerce also issued an affirmative countervailing duty determination (*i.e.*, a determination regarding subsidies provided by foreign governments to the production of the imported merchandise) involving LEU from France, as well as affirmative countervailing duty determinations involving LEU produced by another foreign enricher and imported from Germany, the Netherlands, and the United Kingdom. While the initial appeals involved those countervailing duty determinations as well as the antidumping duty determination on LEU from France, the countervailing duty orders have either been revoked or are not at issue here.

The central issue in the antidumping proceeding before Commerce, and in the subsequent appeals to the U.S. Court of International Trade (CIT) and Federal Circuit, was whether LEU imports pursuant to SWU transactions constituted sales of merchandise, subject to the antidumping law, or sales of services, outside the scope of that law.

Commerce concluded that all LEU entering the United States from France was subject to the antidumping law "regardless of the way in which the sales for such merchandise were structured," App. 47a, 54a, and that this conclusion furthered Congress's intent in enacting the antidumping law. App. 63a.

Commerce found that enrichment accounts for 60% of the value of the LEU, and that it substantially transforms the unenriched uranium, thereby creating a "new and different article of commerce." App. 62a-63a. The Department also noted that imports under either form of contract involve trade in goods, and that exclusion of imports pursuant to "contract manufacturing" from the scope of the antidumping law would have "profound implications for the international trading system as a whole" by enabling parties to convert "trade in goods into trade in so-called 'manufacturing services'. . . . We simply do not consider a major manufacturing process to be a 'service' in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services." App. 63a-64a. The Department found that the overall arrangements in both EUP and SWU transactions involved the sale of LEU and that "[i]n reaching this

conclusion, we have looked beyond the four corners of the contract and have examined the totality of the circumstances surrounding the transactions. . . ." App. 80a.

Accordingly, the antidumping order applied to all imports of LEU from France, including imports pursuant to SWU contracts.

B. CIT Review and Commerce's Redetermination

Eurodif S.A., the foreign enricher in this case, contested Commerce's Final Determination before the Court of International Trade. Eurodif argued that the importation of LEU pursuant to SWU transactions involved sales of services outside the scope of the antidumping law. Its arguments were based, in part, on Commerce's "tolling" regulation, 19 C.F.R. § 351.401(h) (2007). A tolling arrangement is one in which the tollee provides raw materials to the toller, who produces finished merchandise that is delivered to the tollee. The regulation provides guidance as to which entity's prices and costs (*i.e.*, the toller's or the tollee's) will be examined in determining whether dumping has occurred.

The CIT agreed with Commerce that the tolling regulation does not exempt imported merchandise from antidumping proceedings. *USEC Inc. v. United States*, 259 F. Supp. 2d 1310, 1325 (Ct. Int'l Trade 2003) (App. 131a). Nevertheless, the CIT remanded the case to Commerce for reconsideration of how the tolling regulation affected the Department's conclusion that transactions under SWU contracts involved a sale of goods, not services.

On remand, the Department considered both the tolling regulation and its prior precedent, and reexamined the extensive evidence of record regarding how SWU transactions were actually implemented. *Final Remand Determination, USEC Inc. v. United States* (Dep't of Commerce June 23, 2003) (App. 147a). The Department found that these transactions involve "the transfer of ownership [from the enricher to the utility] in the complete LEU product for consideration," App. 217a, and constituted a sale of merchandise. App. 219a-220a. Commerce explained that the enricher "hold[s] inventories of uranium from various sources, including uranium owned by the enricher itself, and produce[s] LEU without relying solely upon the input from a particular customer." App. 221a. Commerce found that the enricher, not the customer, owns the LEU from the time it is produced until the time it is delivered "because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer." App. 219a. Further,

> the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer.

Id. Based on these factors, Commerce concluded that the delivery of LEU pursuant to SWU transactions involves a sale of merchandise subject to the antidumping law. App. 222a.

The CIT, on review, rejected the Department's conclusion. *USEC Inc. v. United States*, 281 F. Supp. 2d 1334 (Ct. Int'l Trade 2003) (App. 268a). Focusing exclusively on the provisions of the SWU contracts, rather than the total evidence of record considered by the Department, the CIT found that the contracts create a "legal fiction" that the natural uranium delivered by the utility is enriched by the enricher and returned as LEU to the utility, and "suggest an intention to establish a continuous chain of ownership in the utility. . . ." App. 277a. In the CIT's view, regardless of the facts of the enrichment process and how SWU transactions are implemented, "the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed." App. 278a.

C. Federal Circuit Decisions on Interlocutory Review

The parties then sought and obtained an order from the CIT permitting an interlocutory appeal to the Federal Circuit pursuant to 28 U.S.C. § 1292(d)(1). *USEC Inc. v. United States*, 27 C.I.T. 1925 (2003) (App. 306a). The Federal Circuit granted the interlocutory appeal and affirmed the CIT's decision. *Eurodif S.A. v. United States*, 411 F.3d 1355, 1361-64 (Fed. Cir. 2005) ("*Eurodif I*") (App. 11a-21a).

In evaluating what it referred to as "[t]he [c]haracterization of [e]nrichment [c]ontracts," App. 12a, the Federal Circuit placed central reliance on a previous case in which the court was called upon to characterize

U.S. Government SWU contracts under a different statute, the Contract Disputes Act (CDA), 41 U.S.C. § 601, *et seq.* (1988), to determine whether interest was payable on certain judgments against the United States, *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002). In that case, the court had agreed with the government's argument that contracts for the enrichment of uranium by the Department of Energy were service contracts not covered by the CDA. App. 15a-16a. The court below extended *Florida Power's* contract-based approach to this case. In its view, "the contracts in this case" made clear that ownership of neither the natural uranium nor the LEU was "meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." App. 15a. "As a result, the 'transfer of ownership' required for a sale under [*NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)] is not present here." App. 15a.

USEC and the United States then sought rehearing and rehearing *en banc*, in part based on the court's improper reliance on *Florida Power* as a basis for failing to defer to Commerce's construction of the antidumping statute. Subsequent to those filings, this Court handed down its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), which clarified that a court must defer to an agency's construction of a statute even if the court had reached a different interpretation in a prior judicial decision unless that prior decision had found that the statute compelled the court's interpretation. *Id.* at 982-85. USEC and the United States brought this decision to the attention of the court in a Rule 28(j) letter. *See* Fed. R. App. P. 28(j). The Federal Circuit denied rehearing *en banc*, but granted rehearing for the limited purpose of addressing the

applicability of the *Brand X* decision. While acknowledging that under *Brand X* deference would be due to Commerce if the antidumping statute were ambiguous, the court stated, "We now clarify ... that the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif S.A. v. United States*, 423 F.3d 1275, 1278 (Fed. Cir. 2005) ("*Eurodif II*") (App. 28a).

D. Proceedings on Remand from the Federal Circuit

Following remand to Commerce, *Eurodif S.A. v. United States*, 414 F. Supp. 2d 1263 (Ct. Int'l Trade 2006) (App. 317a), Commerce stated that it would not assess antidumping duties on imports under SWU transactions. It concluded, however, that it need not amend the scope of the antidumping order because LEU imported pursuant to SWU transactions is physically indistinguishable from imports of LEU pursuant to EUP transactions that would continue to be covered by the order. Rather, in future administrative reviews it would examine the facts of record regarding particular imports and apply the Federal Circuit decisions to those imports. *Low Enriched Uranium from France*, (Dep't of Commerce March 3, 2006) (final results of redetermination) (App. 320a).

On appeal, the CIT rejected Commerce's approach and ordered it to modify the scope of the antidumping duty order to exclude all entries of French LEU imported pursuant to SWU transactions. *Eurodif S.A. v. United States*, 431 F. Supp. 2d 1351 (Ct. Int'l Trade 2006) (App. 327a).

Commerce then adopted language limiting the scope of the antidumping order, while continuing to note its disagreement with both the Federal Circuit's decisions in *Eurodif I* and *II* and the CIT's rejection of its first redetermination. It also specified a form by which the French enricher and U.S. utility customer could certify that particular imports met the conditions for exclusion from the order. *Low Enriched Uranium from France*, (Dep't of Commerce June 19, 2006) (final results of redetermination). (App. 340a).

E. Final Federal Circuit Decision

Following the CIT's affirmance of Commerce's second redetermination, *Eurodif S.A. v. United States*, 442 F. Supp. 2d 1367 (Ct Int'l Trade 2006) (App. 356a), the United States and USEC again appealed to the Federal Circuit. The United States argued that the CIT had erroneously rejected Commerce's first redetermination approach. USEC argued that the determination whether particular imports of LEU were excludable from the order pursuant to the Federal Circuit's earlier decision should be affected by certain additional factors, *e.g.*, whether an affiliate of the enricher supplied the unenriched uranium in the transaction and whether the unenriched uranium was delivered to the enricher after the delivery of the LEU to the utility customer. The Federal Circuit concluded that both appeals raised issues that could best be resolved when particular facts were at issue, and dismissed the appeals as unripe. *Eurodif S.A. v. United States*, 506 F.3d 1051 (Fed. Cir. 2007) (App. 31a).

With the Federal Circuit's dismissal of the appeals, the Federal Circuit's interlocutory decisions in *Eurodif I* and *Eurodif II* have now become incorporated in a final judgment. Absent review by this Court, those decisions will become the governing law regarding the dividing line between trade in goods that are subject to the antidumping law and trade in services that are outside the scope of the antidumping law.

F. Proceedings Regarding Imports of Russian LEU

The impact of the Federal Circuit's decisions is already being felt in another important antidumping case. It is one that has significant implications for the continued successful implementation of a bilateral program for the importation of Russian LEU derived from the dismantling of nuclear weapons of the former Soviet Union. The case involves an antidumping investigation into uranium imported from Russia that was suspended in 1992 as a result of an agreement between the United States and Russia. The agreement currently limits imports of Russian LEU but permits the importation of LEU that has been produced through a process of down-blending the highly enriched uranium in the weapons material with uranium with a much lower U_{235} content. In the pending case, Commerce has conducted a sunset review and concluded that terminating the suspension agreement would likely lead to the continuation or recurrence of dumping. *Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (Dep't of Commerce June 6, 2006).

On September 27, 2007, however, in light of the Federal Circuit's decisions in *Eurodif*, the CIT remanded that determination and directed Commerce to exclude future imports of Russian LEU pursuant to SWU transactions from the scope of that case. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). On December 21, 2007, Commerce filed the results of its remand with the CIT. In its remand results, Commerce applied the *Eurodif* precedent, and concluded based on the specific facts in that review that dumping would likely continue or recur if the suspended investigation were terminated. Other parties in the case, including an association of U.S. utilities and the Russian exporter of LEU, have filed comments with the Court of International Trade urging the court to expressly direct Commerce to explicitly exclude all imports of Russian LEU pursuant to SWU contracts from the case. The court has not yet ruled on Commerce's remand determination.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decisions improperly narrow the scope of the antidumping statute. They significantly limit the protection that law was meant to afford to domestic producers from injurious, unfairly priced imports. Because of the Federal Circuit's exclusive role in the appellate review of antidumping cases, its decisions will conclusively decide the question presented absent review by this Court.

The antidumping statute clearly applies to sales of merchandise, but it does not define when merchandise is "sold." In particular, Congress has not "directly spoken

to the precise question at issue" in this case: whether the statute encompasses import transactions where the U.S. customer supplies cash and raw materials to the foreign producer and the foreign producer delivers a substantially transformed finished product. In this circumstance, the Federal Circuit's failure to defer to Commerce's reasonable construction of the statute is fundamentally inconsistent with *Chevron*, 467 U.S. 837.

The Department considered the language and purpose of the antidumping law and examined the "totality of the circumstances" to determine that the import transactions in this case constitute sales of merchandise under the antidumping statute. The reasonableness of that construction is illustrated by cases interpreting other regulatory statutes applying to the "sale" or "purchase" of goods, where courts have interpreted such terms broadly—looking beyond the formalities of the contract—to effectuate the regulatory purposes of the statute at issue. Moreover, Commerce's approach to the dividing line between what constitutes a transaction involving goods, rather than one involving services, is consistent with how Congress has drawn that line in another trade statute. *See* 19 U.S.C. § 2114b(5) (defining "services" as "economic activities whose outputs are other than tangible goods" for purposes of delineating the U.S. Trade Representative's authority for negotiating international agreements on trade in services).

Rather than deferring to the Commerce Department's reasonable construction of the antidumping law, the Federal Circuit placed significant weight on its own characterization of U.S. government SWU contracts in *Florida Power*, a case that arose under a different statute with a different

purpose. The court's approach would remove imported merchandise from the scope of the antidumping law based solely on the manner in which the parties choose to structure their transaction—a result that the Commerce Department reasonably concluded could not have been intended by the Congress.

Finally, the Federal Circuit's decisions are having a significant impact beyond the immediate case. By removing antidumping constraints on LEU imports when SWU contracts are employed, the Federal Circuit's decisions jeopardize conditions of fair pricing in the U.S. LEU market. This in turn threatens the continued successful implementation of a historic agreement between the United States and Russia for the importation of LEU down-blended from nuclear weapons of the former Soviet Union. In addition, by removing legal constraints on unfairly priced LEU imports, the decision also threatens market disruption that could undermine the viability of the only operating U.S. enrichment plant, and jeopardize initiatives to expand U.S. capacity to produce enriched uranium. Such initiatives include a multi-billion dollar project now being deployed by USEC at U.S. government facilities pursuant to agreements with the Department of Energy using the only advanced U.S. enrichment technology available to meet future U.S. defense needs.

I. THE COMMERCE DEPARTMENT REACHED A REASONABLE CONSTRUCTION OF AN AMBIGUOUS STATUTORY PHRASE.

This petition presents a classic example of the trouble that a federal appellate court can cause when it fails to follow the basic framework of *Chevron*. Under that decision, the court must first determine whether the Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. If not, then the court must "not simply impose its own construction on the statute as would be necessary in the absence of administrative interpretation," but must defer to a "permissible construction of the statute" by the agency. *Id.* at 843 (citation omitted); *see National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) ("If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction . . . even if the agency's reading differs from what the court believes is the best statutory interpretation."). Here, the Federal Circuit failed to follow this fundamental principle.

A. Congress Has Not Directly Spoken to the Question Presented in This Case.

The antidumping law does not define the terms "merchandise" or "sold," and Congress has not spoken directly to the precise question at issue here. There is no explicit congressional guidance as to whether the phrase "foreign merchandise . . . sold" includes transactions such as the ones at issue here: where the U.S. customer supplies cash and raw materials to the

foreign producer and the foreign producer delivers a substantially transformed finished product.

In *Eurodif II*, the Federal Circuit concluded that "the antidumping statute unambiguously applies to the sale of goods and not services." App. 28a. But this conclusion missed the central point. No one contests that the statute applies to the sale of goods and not services. The question is what "sale of goods" (or, more precisely, "merchandise . . . sold") means, and whether that phrase encompasses transactions like the ones at issue in this case. On that issue the statute is ambiguous.

This Court has previously held that analogous statutory terms were ambiguous. For example, this Court has concluded that whatever the term "sale" may mean in other contexts, its meaning in the Securities Exchange Act of 1934 was not unambiguous and required an examination of the Act's purpose and its relation to the particular conduct at issue. *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 466-67 (1969). As the circuit courts have similarly observed, "[t]he phrase 'any purchase and sale' . . . is . . . not to be limited or defined solely in terms of commercial law of sales and notions of contractual rights and duties." *Bershad v. McDonough*, 428 F.2d 693, 696-67 (7th Cir. 1970) (collecting cases). "'Whatever the terms "purchase" and "sale" may mean in other contexts,' they should be construed in a manner which will effectuate the purposes of the specific section of the Act in which they are used." *Id.* (quoting *SEC. v. Nat'l Sec., Inc.*, 393 U.S. at 467 (alteration in original omitted)).

This is consistent with a more general principle: "In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). "[W]ords generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at, not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'" *Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973) (quoting *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. 253, 258 (1937)).

B. Commerce's Construction of the Antidumping Statute Was Reasonable.

Given the antidumping statute's silence as to how the phrase "merchandise . . . sold" should be applied where a customer supplies raw materials to a foreign producer and in exchange receives a finished product, Commerce appropriately considered the statute's underlying purpose and the totality of the circumstances relating to the SWU transactions. On that basis it reasonably concluded that, like imports of identical LEU under EUP contracts, LEU imports pursuant to SWU transactions involved a sale of merchandise. Commerce's approach in this regard was consistent with precedent in other regulatory settings where agencies and reviewing courts had to determine if a "sale" subject to

the regulatory statute had taken place, and other indicia of how Congress wants the line drawn in international commerce between what constitutes trade in goods and what constitutes trade in services.

1. The Term "Sale" Has Been Broadly Construed When Used in Regulatory Statutes.

Many regulatory statutes apply to "sales" of goods between contracting parties. In interpreting the reach of such statutes, regulatory agencies and courts have looked beyond the contract language to determine whether a "sale" or "purchase" subject to the regulatory regime has taken place, and have given due regard to the realities of the transaction at issue and the purpose of the underlying statute.

For example, in *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 392-400 (1965), the Court held that the phrase "sale in interstate commerce of natural gas" in the Natural Gas Act applied to a transaction in which the pipeline company did not purchase natural gas, but rather leased gas fields and arranged for the production of gas by another company. Because there was no transfer of title to the gas, the pipeline claimed there was "no sale." Nevertheless, this Court upheld the Federal Power Commission's decision that the Natural Gas Act applied. It found that the transaction was "very close in economic effect to conventional sales of natural gas," *id.* at 396. The Court stressed the importance of not undermining a regulatory

act's scope by applying overly technical interpretations of "sale" under local law:

> Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered "sales" of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.

Id. at 400 & n.7. The Court further stressed the need to interpret statutory terms "by reference 'to the purpose of the Act and the facts involved in the economic relationship' rather than exclusively by reference to common law standards or local law." *Id.*

The Court in *United Gas Improvement* relied on the "closely analogous" case of *Gray v. Powell*, 314 U.S. 402 (1941). In *Gray*, a railroad leased coal mines, mined the coal using a contractor, and then consumed the coal in its own operations. The railroad argued that it was not subject to the price controls of the Bituminous Coal Act of 1937 because there had been no "sale or other disposal" of coal within the meaning of the Act. Specifically, the railroad pointed out that, "as lessee of the mineral rights [the railroad] is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes" from the independent contractor to the railroad. The Court rejected this focus on title as the basis for identifying a "sale or other disposal" of goods, holding that "the purpose of Congress,

which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code." 314 U.S. at 416.[4]

Indeed, courts have found a sale of goods for regulatory purposes even where there was no delivery of goods at all. In *Callery Properties v. FPC*, 335 F.2d 1004, 1021 (5th Cir. 1964), the court held that the Federal Power Commission could find a sale of natural gas based on payments under take-or-pay contract provisions even when no natural gas was delivered. "When viewed realistically in light of the imperative necessity for long term gas supply commitments, we agree with the Commission that this arrangement constitutes a sale within its power of regulation." The Supreme Court later expanded the relief granted, but did not disturb the ruling on the scope of "sale." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1966).

Just as the agencies in those cases, Commerce here looked to the purpose of the antidumping statute and the characteristics of the transactions in concluding that a sale of merchandise occurred. As Commerce concluded in its Final Determination, "Congress did not intend the [antidumping] and [countervailing duty] laws to be applicable to merchandise based upon the way in which parties structure their transactions. . . ." App. 65a.

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4. In addition, the Court rejected the railroad's claim that it was the "producer" of the coal within the meaning of the Act's exemption for coal "'consumed . . . by the producer'": "To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry." *Gray*, 314 U.S. at 413.

These cases show that, in order to assure the effectiveness of a regulatory scheme, this Court has found a sale of goods even when there was no contractual transfer of title to the goods. Similarly, here Commerce reasonably could conclude that application of the antidumping law should not be undermined by the "legal fiction" in the parties' contracts that the customer retains title to a quantum of raw material until it receives the LEU. Commerce's conclusion is particularly reasonable in light of the facts found by the Department (and not disputed by the CIT or Federal Circuit):

- the enricher produces a new and substantially transformed product (LEU) from commingled fungible unenriched uranium (App. 62a-63a, 69a, 218a);

- the LEU is not produced from the raw material delivered by the customer—and may even have been produced *before* the customer delivered the unenriched uranium (App. 219a); [5] and

- from the time of production through the time of delivery of the imported LEU to the customer, no customer could claim ownership of the delivered LEU (App. 219a).

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5. Indeed, there is no requirement under a SWU contract that the enricher produce *anything* in response to the customer's order. An enricher may fill the order with LEU produced in the past or with LEU obtained from third parties, as is the case with USEC's delivery of Russian LEU down-blended from nuclear weapons of the former Soviet Union. This further indicates that the object of the transaction is not a service to be performed by the enricher on the customer's property, but rather the supply of LEU by the enricher—the same object as in the case of an EUP contract.

Thus, even in light of the definition of sale in prior Federal Circuit case law—"a transfer of ownership to an unrelated party and consideration," *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)—a "sale" could reasonably have been found here. Certainly, under the broad view of "sale" taken by this Court and the regulatory precedents cited, the Department's construction was permissible.

2. Commerce's Construction of the Antidumping Law Is Consistent With the Line Congress Has Drawn Between "Goods" and "Services" in a Relevant Trade Statute.

The proper interpretation of a law may be affected by a later enacted statute not directly amending the statute at issue. *See, e.g., United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute."). That principle of interpretation is relevant here.

An indication of congressional intent as to the dividing line for international trade purposes between trade in services and trade in goods is the provision of U.S. trade law, enacted in 1984, that authorizes the U.S. Trade Representative to negotiate trade agreements covering services. 19 U.S.C. § 2114a. It defines "services" as "economic activities whose outputs are other than tangible goods." *Id.* § 2114b(5). Congress's view that an economic activity resulting in the output of a tangible

good does not constitute a "service" for international trade purposes further supports the reasonableness of Commerce's interpretation that SWU transactions—which unquestionably involve the production and importation of a tangible good—do not constitute the provision or sale of a service.

Indeed, the Federal Circuit's ruling creates a gap in Congress's allocation of responsibilities for international trade matters. The USTR has authority to negotiate trade agreements covering "services," which § 2114b(5) defines as not including economic activities whose outputs are tangible goods. As that definition makes clear, this authority covers such traditional services as banking, insurance, and advertising, but plainly does not cover manufacturing or processing that yields a tangible good, whether it is enriched uranium, a sophisticated computer chip, or a machine tool. Thus, the Federal Circuit has created a situation in which some key economic activities that result in imports into the United States are *neither* subject to the Commerce Department's jurisdiction under the antidumping law as sales of goods *nor* subject to the authority of the USTR to negotiate rules covering such imports under international agreements relating to services.

C. The Federal Circuit Departed From the Teachings of *Chevron* and *Brand X*.

Rather than deferring to Commerce's reasonable construction of the phrase "merchandise . . . sold" in the antidumping statute, the Federal Circuit focused on how the court itself had characterized SWU transactions in its own *Florida Power* decision. In that case, the court

was presented with the question of whether SWU contracts between the Department of Energy and U.S. utilities should be considered sales of goods or sales of services under the Contract Disputes Act, 41 U.S.C. § 601, *et seq.* (1988). The court found that the transactions had aspects of both categories: "In light of the evidence that DOE used feed material from other customers, and sometimes its own feed material, to fulfill a particular . . . order of enriched uranium, *this case does not fall neatly into either the above categories. . . .*" *See Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1373 (Fed. Cir. 2002) (emphasis added).

Despite its recognition in *Florida Power* that SWU transactions do not "fall neatly" on either side of the goods/services divide, the Federal Circuit in *Eurodif I* treated this issue as having been decisively resolved: "Holdings of this court are no less decisive because they may have been difficult to develop." App. 17a. But that very "difficulty" in characterizing the DOE SWU contracts reflects ambiguity—precisely the sort of ambiguity that, when applied to this case, should have signaled to the court its duty to defer to Commerce's reasonable construction. But, on rehearing, the Federal Circuit nevertheless insisted that its decision in *Florida Power* was entitled to persuasive weight.[6]

The court's reliance on *Florida Power* was improper for two fundamental reasons. First, *Florida Power* interpreted an entirely different statute—the Contract Disputes Act. That statute is focused on delineating the rights of the parties to the contract relative to each other.

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6. *See Eurodif II*, at App. 28a (noting that in *Eurodif I* the court had found *Florida Power* to be "persuasive" authority).

See Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 805 (2003) ("The CDA establishes rules governing disputes arising out of certain Government contracts."). This case, however, involves the Commerce Department's construction of the antidumping statute, the purpose of which is to protect *nonparties* to the import contracts—domestic producers that must compete with imports from foreign producers. In this context, contract provisions cannot be given dispositive weight. Given the starkly different purposes of the statutes at issue in *Florida Power* and here, reliance on that case was unwarranted.[7]

Second, even if *Florida Power* had interpreted the antidumping statute, its conclusion could not justify the court's refusal to give deference to Commerce's reasonable interpretation of the statute unless it was clear that Congress had unambiguously intended that imports pursuant to SWU transactions do *not* constitute sales of LEU. "A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency

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7. For much the same reason, court decisions addressing commercial disputes between the parties to a contract are not relevant here. In that context, in declaring the relative rights of the parties, the court may properly seek to give effect to the intentions of the parties as reflected in the language of their contract. In addition, there is no agency application of a statute to be considered. Those cases are not determinative of how a transaction should be characterized under a regulatory regime where the interests of third parties are implicated and an expert agency has been designated to implement the statute.

discretion." *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). The court of appeals plainly expressed its unwillingness to "ignore our previous holdings" because of the factual similarities of the underlying transactions. App. 28a, *citing to* App. 17a. But that is precisely what it must do under *Brand X*. *See id.* (court must approach inquiry as if it were "reviewing the agency's construction on a blank slate"); *see also Skranak v. Castenada*, 425 F.3d 1213, 1220 (9th Cir. 2005) (under *Brand X*, a court reviews subsequent agency determination as if it had "never addressed the topic"). Since *Brand X* would have required the Federal Circuit to take a "blank slate" approach even if its earlier decision had interpreted the antidumping statute, the Federal Circuit's reliance on *Florida Power*—which arose under a completely different statute—is even less appropriate.

In short, the Federal Circuit's decisions in *Eurodif I* and *II* fail to follow the teachings of *Chevron* and *Brand X*. The court concluded that a transaction it deemed to be a sale of a service under one statute cannot be a sale of merchandise under an entirely different statute unless Congress specifically says it is. This conclusion is contrary to repeated instruction from this Court that the same words used in different statutes, or even in different parts of the same statute, can have different constructions depending upon the purposes of the law. *See, e.g., Environmental Defense v. Duke Energy Corp.*, 127 S. Ct. 1423, 1433-34 (2007); *United States v. Cleveland Baseball Co.*, 532 U.S. 200, 213 (2001); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). Moreover, the Federal Circuit's approach places a burden of explicit statement on Congress when

it has entrusted application of the second statute to an expert agency with knowledge of complex industry arrangements. And the Federal Circuit reached this conclusion despite the two statutes' very different terms and entirely different purposes; despite the role of the Commerce Department in interpreting the antidumping law; and despite the fact that the court in *Florida Power* itself found the characterization of such contracts to be a close question even under the Contract Disputes Act.

II. THIS CASE PRESENTS AN ISSUE WITH IMPORTANT NATIONAL IMPLICATIONS.

The Federal Circuit's decisions have important implications for U.S. trade law, for national security, for our nation's energy policy, and for jurisprudential principles of deference to Executive Branch agencies. Any of these implications alone would warrant this Court's granting certiorari. That all of these factors are present here makes this case especially worthy of this Court's consideration.

First, this case involves the basic question: what is a sale of merchandise covered by the antidumping statute? This question is central to the jurisdiction of the Commerce Department and the scope of protection afforded domestic industries by that law. Because of the pivotal importance of this question, it was certified to the Federal Circuit, which issued two opinions attempting to address it. The Federal Circuit's rulings have the potential to create a significant loophole in the antidumping law that would exclude import transactions from the scope of that law based on how the contracts are structured. Arrangements for contract manufacturing are prevalent throughout industry—and will certainly become more prevalent in import transactions if the Federal Circuit's decisions are not reversed.

Second, application of the Federal Circuit's ruling to LEU has important implications for national security, as it endangers the continued successful implementation of a 1993 agreement between the United States and Russia for the dilution (or "down-blending") of weapons material and sale of the resulting LEU in the United States.[8] In that agreement (commonly known as the "Megatons to Megawatts" program), Russia agreed to sell 500 metric tons of highly enriched uranium converted to LEU over a period of twenty years. Under the agreement, USEC, as U.S. executive agent, each year purchases the down-blended LEU in amounts equal to approximately one-half of the annual U.S. consumption for LEU, and ten percent of total U.S. electricity consumption.

In doing so, USEC assumes all risk associated with the sale of the down-blended LEU, including the risk of maintaining a sufficiently large backlog of SWU and EUP contracts to absorb both the large quantity of down-blended LEU and the roughly equal amount of LEU that USEC produces in Kentucky, at the sole remaining U.S. uranium enrichment plant. The revenues from these contracts are used to pay for the LEU imported under the HEU Purchase Agreement, as well as the cost and upkeep of the domestic LEU plant and investment in a project (discussed below) to deploy new U.S. uranium enrichment technology that is critical to U.S. national and energy security.

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8. Agreement Concerning the Disposition of Highly Enriched Uranium Extracted From Nuclear Weapons, U.S.–Russ., Feb. 18, 1993, Temp. State Dep't No. 93-59, 1993 WL 152921 [hereinafter "HEU Purchase Agreement" or "Megatons to Megawatts"].

As of December 31, 2007, there remain approximately 178 metric tons of Russian HEU—equivalent to approximately 7,000 nuclear warheads—to be down-blended and sold in the United States. This represents approximately 35% of the total amount of weapons material to be down-blended under the program. Absent measures to restrain dumping of LEU imports, completion of the program is at risk.

In addition to producing LEU by down-blending the highly enriched uranium in nuclear warheads, Russia has significant capacity, through four large enrichment plants, to produce LEU from natural uranium far in excess of its domestic needs. If this Russian LEU can be imported into the United States outside the scope of the antidumping law, it would disrupt the market conditions needed to ensure the continued success of the weapons dismantling program, since imports of commercially-produced LEU at dumped prices would undermine USEC's ability to sell the down-blended Russian LEU.

The U.S. government has been able to maintain the necessary market conditions for the success of the Megatons to Megawatts program because of a 1992 agreement with Russia (referred to as the "Russian Suspension Agreement") that suspended an antidumping investigation on imports of uranium from Russia, including imports of LEU. That agreement permits imports of Russian LEU under the Megatons to Megawatts program, and pursuant to an amendment signed on February 1, 2008, will permit very limited

imports of commercial LEU under annual quotas.[9] However, if the loophole created by the Federal Circuit in this case is not corrected, the ability to enforce those quotas will be undermined. Since the Russian Suspension Agreement is predicated upon the antidumping law, unless the *Eurodif* loophole is closed Russia will be able to export unlimited quantities of LEU pursuant to SWU transactions over and above any quotas established in the Russian Suspension Agreement. Failure to correct this loophole would thus leave the U.S. government without the means to ensure that the market remains favorable to full implementation of the Megatons to Megawatts program.

Moreover, the Court of International Trade has concluded that, in light of the *Eurodif* decisions, imports of Russian LEU under SWU contracts cannot be subject to the antidumping law. *Techsnabexport v. United States*, 515 F. Supp. 2d 1363 (Ct. Int'l Trade 2007). Because the Federal Circuit's *Eurodif* decisions have been treated as controlling in the Russian proceeding, their foundations have not been reexamined in that case. Accordingly, this case alone provides a complete record for review of the statutory interpretation issue affecting both proceedings.

Third, USEC is currently seeking to finance and deploy a new multi-billion dollar enrichment plant under its 2002 Memorandum of Understanding with the United

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9. The amendment to the Russian Suspension Agreement is reproduced at 73 Fed. Reg. 7705 (Feb. 11, 2008).

States Department of Energy.[10] Removal of the protections that the antidumping law provides against unfairly priced LEU imports could undermine that endeavor. It would also threaten the viability of the existing U.S. enrichment plant. This could further increase the United States' dependence on foreign sources of energy at a time when energy independence is increasingly regarded as a vital aspect of economic and national security. Moreover, both USEC's new plant and its existing plant employ the only uranium enrichment technologies available to meet U.S. defense needs. Other enrichment plants that are being developed or under consideration would employ foreign enrichment technologies, which are subject to restrictions that render them unavailable for the defense needs of the United States military.

Finally, this case raises broader jurisprudential issues regarding lower courts' adherence to the principles set forth by this Court in *Chevron* and in *Brand X*. Those principles require due regard for Executive Branch functions and respect for expert agency determinations when construing and applying critical terms like "sale" in regulatory regimes created by Congress.

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10. *See* Press Release, USEC, "USEC and U.S. Energy Department Sign Accord" (June 18, 2002), *available at* http://www.usec.com/v2001_02/Content/News/NewsTemplate.asp?page=/v2001_02/Content/News/NewsFiles/06-18-02.htm.

CONCLUSION

Few international trade cases have the manifest importance of this one. On this rare occasion when a trade law decision implicates such significant national policies, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SHELDON E. HOCHBERG
Counsel of Record
ERIC C. EMERSON
CHARLES G. COLE
MICHAEL A. VATIS
JOHN P. NOLAN
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

Attorneys for Petitioners USEC Inc. and United States Enrichment Corporation

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED MARCH 3, 2005

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 04-1209, 04-1210

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellants,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Cross Appellants.

March 3, 2005, Decided

Appendix A

OPINION

JUDGES: Before BRYSON, Circuit Judge, PLAGER, Senior Circuit Judge, and PROST, Circuit Judge.

OPINION BY: PROST

PROST, *Circuit Judge.*

This interlocutory appeal comes to us from the United States Court of International Trade, which certified four separate questions for appeal to this court. The Ad Hoc Utilities Group ("AHUG"), Eurodif S.A. ("Eurodif"), Compagnie Generale des Matieres Nucleaires ("CGMN") and Cogema, Inc. appeal two issues from the Court of International Trade. The United States, USEC, Inc. and the United States Enrichment Corporation (the latter two collectively referred to as "USEC" in this opinion) cross-appeal two issues. We affirm the Court of International Trade's decision affirming the Department of Commerce's ("Commerce") industry support determination. We also affirm the court's decision that uranium enrichment contracts constitute a provision of services, rather than a sale of goods. Finally we reverse the court's decision regarding subsidies, and hold that overpayment for uranium enrichment services by foreign government entities cannot constitute a countervailable subsidy. Because we need not review the court's decision regarding Commerce's application of the tolling regulation in the context of export price determination, we decline to do so.

Appendix A

BACKGROUND

Enriched uranium fuel rods are used by the utility industry to generate nuclear power. The process of producing those rods involves multiple steps. First, uranium ore must be mined. Second, the ore must be milled or refined into concentrated uranium. Third, that concentrated uranium must be converted into uranium hexafluoride. Fourth, that uranium hexafluoride must be enriched into low enriched uranium ("LEU"). Fifth, and finally, LEU is used to fabricate uranium rods. This case involves the fourth step in the process of creating uranium rods—the enrichment of uranium hexafluoride into LEU.

Many utilities in the United States contract to buy uranium from a third-party seller and then contract to have that uranium enriched by a uranium enricher. Only one entity in the United States enriches uranium into LEU-USEC, formerly an arm of the federal government. A variety of foreign enrichers, including Eurodif, CGMN and Cogema, compete with USEC and also enrich the uranium of American utility companies.[1]

Contracts for enriched uranium come mainly in two different forms. The first form involves contracts that provide money for the sale of enriched uranium, otherwise known as enriched uranium product, or EUP,

1. The Court of International Trade thoroughly documented the factual background to this case in its opinion. *See USEC Inc. v. United States*, 281 F.Supp.2d 1334 (Ct. Int'l Trade 2003) ("*USEC II*").

contracts. The second form, the form relevant to this appeal, involves the transfer of unenriched uranium by a buyer to an enricher and the purchase of separative work units ("SWU") from the enricher. In these SWU contracts, the enricher enriches the unenriched uranium and delivers LEU to the purchaser. Although the enricher may not necessarily produce a particular utility's LEU from the uranium that utility provides to the enricher, the utility retains title, during the enrichment process, to the quantity of unenriched uranium that it supplies to the enricher.

In most of the transactions relevant to this case, AHUG and American utilities entered into SWU contracts with European enrichers. These utilities compensated enrichers to process unenriched uranium into LEU. In another critical transaction, a partially public French utility, Electricite de France ("EdF"), entered into an SWU contract with French enricher Eurodif. In that contract, EdF allegedly paid Eurodif greater than adequate compensation for the enrichment of uranium.

On December 7, 2000, USEC petitioned Commerce to undertake an antidumping and countervailing duty investigation focusing on LEU coming from France, Germany, the Netherlands, and the United Kingdom. On December 21, 2001, Commerce issued its final determinations in that investigation. Those determinations focused on two main issues: (1) whether SWU contracts were contracts for the sale of goods and not services and, therefore, subject to U.S. antidumping

and countervailing duty statutes, and (2) whether domestic utilities or foreign enrichers were "producers" of LEU for the purposes of determining whether or not there was sufficient industry support to begin an antidumping and countervailing duty investigation in the first place. In its final determinations, Commerce concluded that SWU contracts are contracts for the sale of goods and not services. It also decided that the foreign enrichers of uranium, and not the domestic utilities, were "producers" of LEU.

AHUG and the foreign enrichers party to this case appealed Commerce's determination to the Court of International Trade, arguing that a uranium enrichment contract is a contract for the provision of services and not the sale of goods and, therefore, not subject to federal antidumping and countervailable subsidy statutes. AHUG also disputed Commerce's contention that only the foreign enrichers are "producers" for domestic industry support determination purposes, arguing that Commerce's determination that foreign enrichers were "producers" of LEU was inconsistent with its prior decisions. AHUG further contended that if the domestic utilities are considered producers of LEU, Commerce would not have sufficient domestic industry support to commence an investigation pursuant to 19 U.S.C. § 1673a(c)(4).

The Court of International Trade agreed with AHUG and determined that Commerce's characterization of the enrichment contracts between AHUG and foreign enrichers as contracts for the sale of goods was not

sustainable. *USEC Inc. v. United States*, 259 F.Supp.2d 1310, 1324-26 (Ct. Int'l Trade 2003) ("*USEC I*"). It also found that Commerce's determination that the foreign enrichers were "producers" of LEU was against the weight of the evidence and inconsistent with prior Commerce decisions. *Id.* at 1317-26. As a result, the court remanded the case to allow Commerce to reconsider its determinations.

In its remand determination, Commerce reiterated its original positions. *Final Remand Determination, USEC Inc. and United States Enrichment Corp. v. United States* (June 23, 2003) ("*Remand Determination*"). AHUG and the foreign enrichers then appealed that remand determination to the Court of International Trade. In its second consideration of Commerce's determinations, the court concluded that (1) Commerce's interpretation of the word "producer" in the context of making an industry support determination was reasonable and in accordance with law; (2) uranium enrichment contracts were contracts for services and not for goods; (3) payment by a foreign government entity of more than adequate remuneration to a foreign enricher for enrichment services qualified as a countervailable subsidy; and (4) Commerce's interpretation of the word "producer" for the purposes of making an export price determination was inconsistent with its previous determinations in other cases and thus not in accordance with law. *USEC Inc. v. United States*, 281 F.Supp.2d 1334 (Ct. Int'l Trade 2003) ("*USEC II*").

Appendix A

Because the resolution of the issues decided by the court in *USEC II* are potentially dispositive of this entire case, the Court of International Trade certified four specific questions for appeal to this court. The four certified questions are:

(1) Whether Commerce's decision not to apply its tolling regulation to determine whether American utilities should be considered "producers" of low enriched uranium (LEU) for the purposes of determining whether there was enough domestic industry support to proceed with an investigation is in accordance with law. (Commerce determined that foreign enrichers and not domestic utilities were "producers" of LEU for the purposes of determining domestic industry support. *Remand Determination* at 6-36.)

(2) Whether Commerce's decision that the enrichment of uranium feedstock pursuant to separative work unit (SWU) contracts constitutes a sale of goods instead of services is supported by substantial evidence and in accordance with law. (Commerce determined that SWU contracts like EUP contracts are contracts for the sale of goods. *Remand Determination* at 70-81.)

(3) Whether Commerce's decision that payment of more than adequate remuneration for enrichment services by partially public foreign entities to foreign enrichers constitutes a countervailable subsidy is in accordance with law. (Commerce determined that the transaction between EdF and Eurodif was a sale of goods to a government entity for more than adequate

remuneration and, therefore, subject to the countervailing duty statute. *Remand Determination* at 82-99.)

(4) Whether Commerce's decision to apply a definition of "producer" in the context of export price determination that is different from the definition it used in the industry support determination is reasonable and therefore in accordance with law. (Commerce determined that foreign enrichers were "producers" of LEU for the purposes of determining LEU export price. *Remand Determination* at 69-70.)

We have jurisdiction to hear this appeal under 28 U.S.C. § 1292(d)(1).

DISCUSSION

In reviewing the Court of International Trade's decisions in this case, we apply the same standard used by that court in evaluating Commerce's determinations, findings and conclusions and hold unlawful any decisions found to be unsupported by substantial evidence or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

A. The Tolling Regulation and Commerce's Industry Support Determination

Before an antidumping and countervailing duty investigation can be initiated, the petition on which that investigation is based must meet certain industry

support requirements. A petition is considered to be filed on behalf of an industry if:

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A) (2000).

Commerce determined that in order to be a producer, an entity must have a "stake" in the domestic industry in question. Commerce then defined having a "stake" as undertaking the "actual production of the domestic like product" within the United States. *Remand Determination* at 13. Commerce's industry support determination considered USEC to be the only domestic producer of LEU. Accordingly, Commerce found that there was sufficient domestic industry support to begin an antidumping and countervailing subsidy investigation. The Court of International Trade affirmed Commerce's determination that foreign uranium enrichers were "producers" for the purposes of § 1673a(c)(4)(A).

On appeal, appellants AHUG, Eurodif, CGMN and Cogema argue that American utility companies should be considered "producers" for the purposes of determining whether USEC's petition has sufficient industry support to trigger Commerce's antidumping and countervailing duty investigation. In support, they note that Commerce's tolling regulation orders Commerce not "to consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h) (2004). According to the appellants, if the tolling regulation were applied in this case, Commerce could not initiate any antidumping or countervailing duty investigation because the domestic utilities would be considered "producers" for the purposes of an industry support determination—and given such a definition of "producer," the dictates of § 1673a(c)(4)(A) would not be satisfied. They draw further support for their argument from prior Commerce determinations that held that control of the aspects of manufacture is sufficient to qualify an entity as a "producer." Finally, they buttress their argument by alleging that Commerce improperly and inconsistently applied the tolling regulation by using it to determine the export price of LEU but declining to apply it in its industry support determination.

The Court of International Trade rejected AHUG's argument and sustained Commerce's interpretation of the term "producer" for the purpose of an industry support determination as well as its refusal to apply the

tolling regulation to encompass American utilities within the definition of the term "producer." *USEC II*, 281 F.Supp.2d at 1346. The court supported its holding by determining that Commerce's use of the tolling regulation was in keeping with the purposes of the industry support statute and that Commerce's interpretation of the word "producer" was reasonable and, thus, in accordance with law. *Id.* On this issue, we agree with the Court of International Trade and affirm Commerce's initial industry support determination.

Commerce's determination that domestic utilities were not "producers" of LEU is consistent with the purpose of § 1673a(c)(4)(A). Section 1673a(c)(4) speaks of "industry support" and, as expressed in legislative history, Congress intended the industry support statute "to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation." S.Rep. No. 249, 96th Cong., 1st Sess. 47 (1979). This view was echoed by the Court of International Trade when it noted that "[t]he language in the legislative history is broad and unqualified. It contrasts industries suffering adverse effect with those having no stake: the former have standing, the latter do not." *Brother Indus. (USA), Inc. v. United States*, 801 F.Supp. 751, 757 (Ct. Int'l Trade 1992). Commerce interpreted having a "stake" as requiring that a company "perform some important or substantial manufacturing operation." *Remand Determination* at 14 (internal quotations and citations omitted). There is no basis to conclude that Commerce's interpretation in this context is unreasonable or not in accordance with law.

Further, determining the export price of a good and determining whether a petition has enough support for an investigation to be initiated are two different tasks that were delegated to Commerce for different purposes. Thus, using the tolling regulation in one context but not using it in another is a clearly insufficient basis upon which to conclude that Commerce's action was not in accordance with law.

B. The Characterization of Enrichment Contracts

Under the statutory scheme adopted by Congress, the sale of goods (or "merchandise") is covered by the antidumping duty statute. *See* 19 U.S.C. § 1673. The provision of services, however, is not covered by that statute.

In a previous case dealing with SWU contracts and the Contract Disputes Act ("CDA"), we agreed with the government's argument that an SWU contract for the enrichment of uranium is a service contract and, thus, not covered by the CDA. *See Fla. Power & Light Co. v. United States*, 307 F.3d 1364 (Fed.Cir.2002). The parties dispute the relevance of *Florida Power* to this case.

On appeal, the government and USEC submit that Commerce's finding that SWU contracts are contracts for the sale of goods is supported by substantial evidence and in accordance with law and that the Court of International Trade's holding to the contrary should be reversed. They rely on three principal contentions.

First, they argue that this court's precedents in *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369 (Fed.Cir.2004), *AK Steel Corp. v. United States*, 226 F.3d 1361 (Fed.Cir.2000), and *NSK Ltd. v. United States*, 115 F.3d 965 (Fed.Cir.1997) support their argument that the SWU contracts in question were sales of merchandise and not arrangements for services. They point to this court's construction of the word "sold" in *NSK* as supporting the view that a sale requires "both a transfer of ownership to an unrelated party and consideration." *See NSK*, 115 F.3d at 975. They also cite to our opinions in *AK Steel* and *NTN* as supporting this construction. According to the government and USEC, this straightforward interpretation should cover the SWU contracts because those contracts involved a transfer of title to LEU from the enricher to the utilities upon sampling and weighing of the LEU and consideration paid by the utilities to the enrichers.

Second, the government and USEC assert that Commerce's characterization of the SWU contracts as contracts for the sale of goods is in keeping with the general purpose of the antidumping statute, which they articulate as "provid[ing] domestic producers protection from all dumped imports."

Third, the government and USEC point to the deferential standard of review under which we review Commerce determinations as precluding a reversal of Commerce's determination on this issue. They argue that because Commerce's determination that SWU contracts are contracts for the sale of goods is, in their eyes,

supported by substantial evidence and in accordance with law, we should affirm it.

It is on these grounds, according to the appellants, that *Florida Power* is inapposite to this case. Because *Florida Power* dealt with a contractual dispute under the CDA and not an antidumping investigation, it is not, in their view, applicable here. Moreover, they argue that *Florida Power* stands for the proposition that "SWU contracts [fall] into neither [the category of sales of goods nor the category of contracts for services]." As support, they point to language in our opinion in *Florida Power* that indicates that an SWU contract "does not fall neatly into" either side of the goods-services divide. *See Fla. Power*, 307 F.3d at 1373. The government and USEC consider this language sufficient to support Commerce's determination given the deferential standard of review to be applied in this case.

The Court of International Trade rejected Commerce's determination that the SWU contracts in this case were contracts for the sale of goods and not services, resting its decision on the fact that the enrichers never obtained ownership of either the feed (unenriched) uranium during enrichment or the final LEU product. *USEC II*, 281 F.Supp.2d at 1339. Furthermore, according to the court, the SWU contracts between the utilities and the enrichers demonstrated "an intention to establish a continuous chain of ownership in the utility while maintaining the enricher's ability to cover its obligations under the contract should it encounter difficulties in producing or providing LEU for

a customer." *Id.* The court also found that "nothing in the evidentiary record supports a determination that the enricher has any ownership rights [under the SWU contracts]." *Id.* at 1340. Agreeing with the Court of International Trade, we reject Commerce's determination that the SWU contracts in this case are contracts for the sale of goods.

In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched. While it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplies to the enricher. The utility's title to that uranium is only extinguished upon the receipt of title in the LEU for which it contracted. Therefore, the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale under *NSK* is not present here.

As previously noted, we explicitly dealt with whether or not SWU contracts were contracts for services or goods in *Florida Power* (albeit in the context of a CDA claim and not in the context of an antidumping investigation). In that case, the government argued that

SWU contracts were contracts for services and not goods. There, the government pointed out in its briefs that the SWU contracts in that case consistently referred to "enrichment services" and that the "fundamental purpose" of those contracts was "the provision of enrichment services." The government further declared that the utilities' argument in that case that the SWU contracts arranged for the sale of goods because title passed between utilities and enrichers "rest[ed] on [a] technicality."[2]

The relevant SWU contract terms in that case are identical to the contract terms in this case. Indeed, the government successfully defeated the CDA claim of the utilities in *Florida Power* solely on the ground that the SWU contract in that case was a contract for services and not for goods. And while *Florida Power* is not binding precedent for this case because of the different statutory scheme involved, we find its reasoning and its conclusion persuasive.

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2. The title argument that "rest[ed] on [a] technicality" in that case is strikingly similar to the title argument that the government advances in this case. There, the government argued that despite the temporary transfer of title of uranium from the utility to the enricher, the fact that the utilities were entitled to claim any leftover material from uranium enrichment (also known as "tails") showed that the SWU contract was a contract for services. Here, the utilities were likewise contractually entitled to reclaim the uranium "tails" and title to the quantity of unenriched uranium transferred by the utility only passed to the enricher once the utilities received title to the LEU from the enrichers.

In addition, while it is true that we stated that SWU contracts "[do] not fall neatly into either [a sale of goods or a contract for services]," our opinion definitively held that the SWU contract in that case was a contract for the provision of services. *Fla. Power*, 307 F.3d at 1373.[3] Holdings of this court are no less decisive because they may have been difficult to develop. Indeed, our characterization of the SWU contract in *Florida Power*, however we may have arrived at it, created the sole basis for denying the utilities in that case relief under the CDA. And even under the deferential standard of review that we apply in this case, we choose not to ignore our previous holdings, particularly where the circumstances in a previous case are nearly identical to the case at hand.

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3. In regards to the contracts between utilities and the government for enrichment of uranium, we stated in *Florida Power*:

> It seems clear that if the government purchased natural uranium directly from a third party, enriched the uranium, and sold it to the customer utilities, the contracts would be for the disposal of personal property and would be covered by the CDA. It seems equally clear that if the government simply enriched each utility's uranium for a fee, it would be providing a service, not disposing of personal property.
>
> In light of the evidence that DOE used feed material from other customers, and sometimes its own feed material, to fulfill a particular enriched customer's order of enriched uranium, this case does not fall neatly into either the above categories, but it is closer to the latter. The nature of the contractual pricing scheme, in particular, persuades us that the transaction is properly characterized as a service rather than a sale.

307 F.3d at 1373.

Moreover, while the statutory schemes involved in *Florida Power* and those involved in this case are different, they do not change the essential nature of the transaction involved in this case. Even though the government is correct in arguing that the general purpose of the antidumping statute is not the same as the general purpose of the CDA, it is incorrect in asserting that this dissimilarity of purposes is sufficient to compel a different result in this case. A contract for services of the kind that we discuss here entails a certain set of obligations on the part of contracting parties that do not change with the statutory scheme. Thus, unless Congress specifically gave guidance in the statutory text that certain contracts normally considered service contracts should be considered contracts for the sale of goods in the antidumping context, the different overall purposes of the CDA and antidumping statute are insufficient to alter our analysis here. And nothing in the text of the antidumping statute or its legislative history evidences such a Congressional intent to re-characterize contracts like the SWU contracts at issue in this case for the purposes of antidumping investigations by Commerce.

The persuasive power of *Florida Power* might be mitigated if the government were capable of showing that the contract in that case differed in relevant part from the contracts in this case. No such showing has been made. In *Florida Power*, we held that an SWU contract was not a contract for "the procurement of property" under the CDA. 307 F.3d at 1373-74. Though we did say that SWU contracts do "not fall neatly" either into the

category of contracts for services or the category of contracts for the sale of goods, we found that "the nature of the contractual pricing scheme . . . persuade[d] us that the [SWU] transaction is properly characterized as a service rather than a sale." *Id.* The pricing scheme in the *Florida Power* SWU contracts is the same as the pricing scheme in the contracts at issue in this case. In both cases, utilities bought separative work units from enrichers. In both cases, they delivered unenriched uranium and monetary compensation to enrichers in return for enrichment services. In both cases, there were similar title and transfer provisions. And in both cases, the contracts explicitly contemplated the rendering of "enrichment services."

We therefore conclude that the SWU contracts at issue in this case were contracts for the provision of services and not for the sale of goods. Accordingly, we find that the LEU produced as a result of those contracts is not subject to the antidumping statute and hold that Commerce's contentions to the contrary are not in accordance with law.

C. EdF, Eurodif and Countervailable Subsidies

In order to be subject to a countervailing duty (or subsidy) investigation, an arm of a foreign government must make a "financial contribution" to a manufacturer that can take one of four forms:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the

potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.

19 U.S.C. § 1677(5)(D) (2000). A public entity can provide a subsidy if it provides goods or services to a manufacturer for less than adequate remuneration or if it buys goods from the manufacturer for more than adequate remuneration. 19 U.S.C. § 1677(5)(E). The statute does not contemplate the purchase of services for more than adequate remuneration to be a subsidy.

The government and USEC assert that EdF, a partially public French utility, entered into a uranium enrichment contract with Eurodif that paid Eurodif more than adequate remuneration. In their view, the contract was also for the sale of goods (instead of services) and thus covered by 19 U.S.C. § 1677(5)(E). In the alternative, they argue that the contract between EdF and Eurodif provided more than adequate remuneration to one step (enrichment) in the manufacture of a good (LEU in this case) and was thus covered by § 1677(5). As a result, the transaction between EdF and Eurodif was subject to a countervailing duty investigation.

Appendix A

The Court of International Trade rejected the government's principal theory but agreed with its alternative theory. The court found that "Commerce's distinction between manufacturing processes that lead to the production of subject merchandise and other services that do not produce tangible goods is consistent with the language and purpose of the countervailing duty statute." *USEC II*, 281 F.Supp.2d at 1350. The court further elaborated that this theory was in keeping with the statutory language "because it preserves a real distinction between 'goods' and 'services.'" *Id.* We must disagree.

Section 1677(5) is clear as to what constitutes a subsidy—and the purchase of a service by a foreign public entity, however related to the manufacture of a good, is not contemplated in the statute as being a subsidy.[4] While the provision of services by a government entity to another entity for less than adequate compensation may be considered a subsidy, the plain language of § 1677(5) does not allow for the *purchase* of services by a government entity from another entity to be considered a subsidy. Thus, to the extent that the government argues that Commerce is owed deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we reject that argument because we find that the plain meaning of the statute is unambiguous.

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4. Section 1677(5)(B) defines a subsidy as including the case in which an authority "provides a financial contribution . . . to a person and a benefit is thereby conferred." Section 1677(5)(D), quoted *supra*, defines "financial contribution."

Furthermore, § 1677(5)(D)(iii) clearly shows that Congress was aware of the distinction between contracts for services and contracts for goods. Aware of the distinction, Congress could have easily included the purchase of services by public entities in the statutory definition of a subsidy. Because it did not, we must assume that the omission was intentional. *See Clay v. United States*, 537 U.S. 522, 528, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we have recognized, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotations and citations omitted)).

While the Court of International Trade, the government and USEC are correct that the purpose of the subsidy statute is to defeat unfair competitive advantage, that purpose cannot exceed the metes and bounds of the subsidy statute as established by its text. *See Negonsott v. Samuels*, 507 U.S. 99, 105, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993) ("[A court's] task is to give effect to the will of Congress, and where it has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive." (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982))).

Given that we have already concluded that the SWU contracts in this case were contracts for the provision of services and not for the sale of goods, we hold that 19 U.S.C. § 1677(5) is inapplicable in this case. Accordingly, Commerce's determination to the contrary is not in accordance with law.

D. Commerce's Tolling Regulation and Its Determination of Export Price

Because our holdings regarding the previous three issues obviate the need for us to reach the issue of whether Commerce properly employed its tolling regulation in its determination of export price, we decline to do so.

CONCLUSION

For the reasons stated above, we hold that:

(1) Commerce's determination that USEC's petition had sufficient industry support to trigger an antidumping and countervailing subsidy investigation was in accordance with law;

(2) Commerce's finding that the SWU contracts in this case were contracts for the sale of goods was neither supported by substantial evidence nor in accordance with law; and

(3) Commerce's application of 19 U.S.C. § 1677 to the SWU transaction between EdF and Eurodif was not in accordance with law.

Therefore, we affirm the Court of International Trade's decision regarding Commerce's industry support determination. We likewise affirm the court's finding that the SWU contracts in this case were contracts for services and not for goods or merchandise. We reverse the court's holding that EdF's SWU contract with Eurodif made the LEU produced by Eurodif subject to the countervailing subsidy statute.

AFFIRMED-IN-PART and REVERSED-IN-PART

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED SEPTEMBER 9, 2005

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 04-1209, 04-1210

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellants,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Cross Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Cross Appellants.

September 9, 2005, Decided

JUDGES Before BRYSON, Circuit Judge, PLAGER, Senior Circuit Judge, and PROST, Circuit Judges.

OPINION BY: PROST

Appendix B

OPINION

ON PETITION FOR REHEARING

PROST, Circuit Judge.

ORDER

More than three months after we decided this case, the Supreme Court issued its opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, __ U.S. __, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005). In letters disclosing *National Cable* as a supplemental authority pursuant to Federal Circuit Rule 28(j), the United States, USEC, Inc. and the United States Enrichment Corporation (collectively, "Petitioners") contend that the Supreme Court's reasoning in *National Cable* strongly supports arguments presented in their petitions for rehearing. We grant the petitions for rehearing by the panel for the limited purpose of addressing the applicability of *National Cable* to this case. In all other respects, we reaffirm our earlier opinion and judgment. *See Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005).

I

In *National Cable* the Supreme Court heard an appeal from the Ninth Circuit in a case involving the proper regulatory classification of broadband cable Internet service under the Communications Act of 1934, 48 Stat. 1064, as amended by the Telecommunications Act of 1996, 110 Stat. 56. *See* 125 S.Ct. at 2696. The Ninth Circuit had vacated a ruling by the Federal Communications Commission ("FCC") to the extent the

FCC's ruling concluded that cable modem service was not "telecommunications service" under the Communications Act. *Id.* at 2698. "Rather than analyzing the permissibility of that construction under the deferential framework of *Chevron*, . . . the Court of Appeals grounded its holding in the *stare decisis* effect of *AT&T Corp. v. Portland*. . . ." *Id.* (citations omitted).

The Supreme Court reversed and remanded. It held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Id.* at 2700. It similarly stated that "[b]efore a judicial construction of a statute, whether contained in a precedent or not, may trump an agency's, the court must hold that the statute unambiguously requires the court's construction." *Id.* at 2702.

The Supreme Court explained that *Chevron* set forth a two-step process to evaluate whether an agency's interpretation of a statute is lawful. At step one we determine "whether the statute's plain terms 'directly addres[s] the precise question at issue.' " *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). If we determine that the statute is ambiguous on the precise question at issue, "we defer at step two to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make.' " *Id.* (quoting *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). On the other hand, if we determine that the statute is unambiguous on the precise question at issue, we do not defer to the agency's

interpretation, regardless of whether that interpretation is grounded in a reasonable policy choice. *See id.*

II

Petitioners argue that the holding of *National Cable* strongly supports their contention that we erroneously relied upon *Florida Power & Light v. United States*, 307 F.3d 1364 (Fed.Cir.2002), to conclude that the Department of Commerce's ("Commerce's") finding, that the separative work units ("SWU") contracts at issue in this case were contracts for the sale of goods and therefore subject to the antidumping duty statute, is not in accordance with law. In particular, the United States argues that we have not held, either in *Florida Power* or here, "that the antidumping 'statute unambiguously requires' that the term 'sold' excludes the acquisition of imported merchandise in exchange for raw materials and cash." Similarly, USEC, Inc. and the United States Enrichment Corporation (collectively, "USEC") contend that we "erroneously relied upon the earlier determination of this Court in *Florida Power & Light Co. v. United States* so as to fail to give appropriate deference to the Commerce Department's conclusion that the import transactions [here] involved a sale of merchandise under the antidumping law."

III

As a preliminary matter, Petitioners are incorrect to the extent they imply that we found ourselves bound by *Florida Power* in this case under the doctrine of *stare decisis*. To the contrary, we specifically stated that " *Florida Power* is not binding precedent for this case" but that it is "persuasive" authority. *Eurodif*, 411 F.3d

at 1363; *cf. National Cable*, 125 S.Ct. at 2701 (noting that the Ninth Circuit held that a prior judicial construction of a statute categorically controls an agency's contrary construction).[1]

On the other hand, Petitioners are correct to the extent they point out that in *Florida Power* we did not expressly hold that the antidumping duty statute "unambiguously" applies to contracts for the sale of goods only and "unambiguously" does not apply to the contracts at issue in this case in particular. And although in our opinion in this case we did expressly hold that the countervailing duty statute unambiguously does not allow for the purchase of services to be considered a subsidy, *Eurodif*, 411 F.3d at 1365, as in *Florida Power* we did not expressly state that the antidumping duty statute unambiguously applies to contracts for the sale of goods only and unambiguously does not apply to the contracts at issue in this case in particular.

We now clarify by stating expressly that the antidumping duty statute unambiguously applies to the sale of goods and not services. In our opinion, we stated that "[u]nder the statutory scheme adopted by Congress, the sale of goods (or 'merchandise') is covered by the

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1. In this regard, we rejected the argument that we should ignore the analysis and reasoning of *Florida Power* because that case involved a different statutory scheme. We chose not to ignore *Florida Power*, but instead to recognize its persuasive power, because the nearly identical circumstances in that case were those surrounding SWU contracts. *See Eurodif*, 411 F.3d at 1363.

antidumping duty statute" but that the "provision of services, however, is not. . . ." *Eurodif*, 411 F.3d at 1361. While we did not use the term "unambiguous," we clearly foreclosed any argument that § 1673 is ambiguous on the precise question of whether the antidumping duty statute encompasses contracts for services. It undoubtedly does not.

Commerce's characterization of the SWU contracts at issue in this case would contradict, we conclude, the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods. While Petitioners concede that a sale of goods requires a transfer of ownership, *see* United States' Petition for Rehearing at 9 (citing *NSK Ltd. v. United States*, 115 F.3d 965 (Fed.Cir.1997)) and USEC's Petition for Rehearing at 2 (same), they do not recognize the critical importance of the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ("LEU") product. Nevertheless, the inescapable conclusion flowing from this circumstance is that the enrichers do not "sell" LEU to utilities pursuant to the SWU contracts at issue in this case.

As we stated in our opinion:

> In reviewing the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant

> time periods that the uranium is being enriched. While it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplie[d] to the enricher. The utility's title to that uranium is only extinguished upon the receipt of title in the LEU for which it contracted. Therefore, the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the "transfer of ownership" required for a sale [of goods] is not present here.

Eurodif, 411 F.3d at 1362. We adhere to that analysis today, noting that the complete absence of a transfer of ownership over LEU requires that we reject Commerce's application of the antidumping duty statute to the SWU contracts.

IV

This Order constitutes the panel's action in response to the petitions for rehearing. We conclude that our analysis in this case is consistent with the Supreme Court's holding in *National Cable*, and we reaffirm our decision that Commerce's finding that the SWU contracts were contracts for the sale of goods and therefore subject to the antidumping duty statute was not in accordance with law.

APPENDIX C — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DECIDED SEPTEMBER 21, 2007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1005, -1006

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES, and COGEMA, INC.,

Plaintiffs-Appellees,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Appellants.

DECIDED: September 21, 2007

Before MICHEL, *Chief Judge*, LOURIE, *Circuit Judge*, and ROBERTSON, *District Judge*.*

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* Honorable James Robertson, District Judge, United States District Court for the District of Columbia, sitting by designation.

Appendix C

ROBERTSON, *District Judge*.

In this dispute about the correct application of the antidumping statute, 19 U.S.C. § 1673, to enriched uranium feedstock, appellants United States, USEC Inc., and United States Enrichment Corp. (the latter two collectively referred to as "USEC") appeal from a judgment of the United States Court of International Trade. *Eurodif S.A. v. United States*, 442 F.Supp.2d 1367 (Ct. Int'l Trade 2006). In 2005, we issued two interlocutory opinions in the same case, *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005) ("*Eurodif I*"), and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed.Cir.2005) ("*Eurodif II*"). Because the issues appellants raise in the instant appeal concern only the application of those decisions to future entries of low enriched uranium, we dismiss the appeal as unripe.

I. BACKGROUND

In *Eurodif I* and *Eurodif II*, we found that separate work unit ("SWU") contracts for the enrichment of uranium were contracts for services, rather than for the sale of goods, and that the low enriched uranium ("LEU") produced under those contracts was therefore not subject to the antidumping statute. *Eurodif I*, 411 F.3d at 1364; *Eurodif II*, 423 F.3d at 1278. Following those decisions, the Court of International Trade issued a remand order, instructing the Department of Commerce ("Commerce") to revise its final determination and order, and to "explain how its final determination and order on remand has eliminated all SWU transactions" in

accordance with our decisions. *Eurodif S.A. v. United States*, 414 F.Supp.2d 1263 (Ct. Int'l Trade 2006) ("*Eurodif III*"). Acting pursuant to that order, Commerce excluded LEU covered by SWU contracts from its recalculation of the duty margin, *Final Results of Redetermination Pursuant to Court Remand, Eurodif S.A. v. United States* (Mar. 3, 2006), but it did not modify the scope of the antidumping duty order to exclude future imports of LEU covered by SWU contracts.

Plaintiffs-Appellees Eurodif S.A., Cogema, and Cogema, Inc. (collectively referred to herein as "Eurodif") supported Commerce's action, as far as it went, but they also asked the Court of International Trade to require Commerce to amend the scope order so that it would expressly exclude LEU covered by SWU contracts. Defendant-Appellant USEC supported Commerce's decision not to amend the scope order, but asserted that it was error for Commerce to exclude all LEU imported pursuant to SWU contracts from its recalculation without investigating the facts behind each contract to determine whether the transaction was a sale of services, as stated in the contract, or was in fact a sale of goods.

The Court of International Trade agreed with Eurodif. It found that our opinions in *Eurodif I* and *Eurodif II* took into account the factual circumstances operating behind the individual contracts in this case and therefore that Commerce was correct to exclude all LEU covered by those SWU contracts from its recalculation.

Eurodif S.A. v. United States, 431 F.Supp.2d 1351, 1354 (Ct. Int'l Trade 2006) ("*Eurodif IV*"). Furthermore, the Court of International Trade concluded that our previous opinions required Commerce to rewrite the scope of the antidumping duty order, and it remanded the case to Commerce once again with instructions to amend the order to exclude all LEU covered by SWU contracts from the "class or kind of merchandise" covered by the order. *Id.* at 1355 (citing 19 U.S.C. § 1673e(a)(2)). On this second remand, Commerce redefined the scope of the antidumping order to exclude any entry of LEU that is accompanied by a certification claiming that the entry is made pursuant to a SWU contract. The Court of International Trade sustained, *Eurodif S.A. v. United States*, 442 F.Supp.2d 1367 (Ct. Int'l Trade 2006) ("*Eurodif V*"), and this appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II. DISCUSSION

In *Eurodif I* and *Eurodif II*, we found that the SWU contracts at issue "in this case" were contracts for the sale of services that were not subject to the antidumping statute. *See Eurodif I*, 411 F.3d at 1362, 1364. We did not address how Commerce should determine whether *future* entries of LEU are made pursuant to SWU contracts. The contentions of the government and USEC on this appeal are directed to future entries. They argue that Commerce should be permitted to suspend liquidation of future LEU imports until it determines—transaction-by-transaction and by administrative review—whether the SWU contract exception applies.

USEC additionally argues that the scope amendment and certification should be modified now to make it clear that future LEU imports will not be outside the scope of the antidumping law if the unenriched uranium is either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after entry.

Neither the procedural question presented here (scope review vs. administrative review) nor the substantive questions relating to affiliation of the enricher are ripe for decision. The doctrine of ripeness is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). It is drawn "both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction, but, even in a case raising only prudential concerns, the question of ripeness may be considered on a court's own motion." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003) (citing *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (citations omitted)).

Appendix C

Administrative Review vs. Scope Determination

The Court of International Trade found that an administrative review is not the "proper forum to address whether merchandise is within the scope of an order," and that Commerce's own regulations authorize a different mechanism for this purpose: a "scope determination." *Eurodif IV*, 431 F.Supp.2d at 1356. At the request of any interested party, Commerce may "initiate an inquiry" as to whether merchandise is within the scope of an antidumping duty order. *Id.* (citing 19 C.F.R. § 351.225(b)). If the Secretary determines that the product in question is included within the scope of the order, he may instruct Customs to suspend liquidation for each unliquidated entry, effective as of the date the scope inquiry was initiated. 19 C.F.R. § 351.225(l)(2). That determination is reviewable by the Court of International Trade. 28 U.S.C. § 1581(c).

Appellants argue that this scope determination process is inadequate, because, as a practical matter, an entry of LEU under review will be liquidated before Commerce can complete its determination. They assert that determining whether a particular transaction is entitled to the SWU-contract exception requires a careful analysis of the contract itself and an opportunity to investigate the manner of its execution. The administrative review process would permit Commerce to suspend liquidation while such an assessment takes place, but the scope determination process permits Commerce to suspend liquidation only after the Secretary has issued a preliminary scope ruling. USEC

notes that liquidation typically occurs ten months after entry, but Commerce's previous assessments of LEU contracts have taken seventeen to eighteen months.[1] As a result, appellants argue, the scope determination process will not be completed before the entry under review has been liquidated, mooting the review.

This dispute is about what may or may not happen with the next LEU case—a case about which we have no facts. Our decisions in *Eurodif I* and *Eurodif II* did not resolve the procedural problem that USEC and the government have presented here, but we decline to attempt a resolution on this record. We have held that SWU contracts are contracts for services and that the LEU in this case entered under SWU contracts. Whether the next contested shipment of LEU is covered by a valid SWU contract is a question that must await the next case. If Commerce is correct, and the next disputed LEU entry is liquidated before Commerce can complete its scope review, the dispute will not be rendered non-justiciable, as it would be "capable of repetition, yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

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1. Eurodif responds that Commerce's regulations provide for the issuance of final scope rulings within 120 days, but the regulation clearly states only that a decision "normally" will be reached within that time. 19 C.F.R. § 351.225(f)(5).

Appendix C

LEU Obtained from or Sold to Affiliates

The more substantive questions USEC brings on this appeal also require a specific factual context for their resolution, and such a record is not before us. USEC wants it made clear that future LEU imports will not avoid antidumping penalties if the unenriched uranium was either (a) obtained from an affiliate of the enricher or (b) delivered to the enricher after the importation of the LEU. Although USEC does not challenge our finding that the contracts in this case were contracts for the sale of services,[2] it seeks clarification as to whether our holding would apply to future entries with these characteristics. Until we have record evidence regarding such entries, however, USEC's questions are non-justiciable. *Elec. Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 443, 58 S.Ct. 678, 82 L.Ed. 936 (1938) ("We are invited to enter into a speculative inquiry for the purpose of condemning statutory provisions the effect of which in concrete situations, not yet developed, cannot now be definitely perceived. We must decline that invitation.").

III. CONCLUSION

For the aforementioned reasons, we dismiss.

DISMISSED.

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2. USEC initially requested that we order Commerce to reopen the record of the SWU contracts analyzed in *Eurodif I* and *Eurodif II* to examine purchases of unenriched uranium from affiliates, but now acknowledges that it raised this question in its appeal of Commerce's final redetermination of the antidumping duty, and that we rejected that appeal. *Eurodif S.A. v. United States*, 217 Fed.Appx. 963 (Fed.Cir.2007).

Appendix C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-1005, -1006

EURODIF S.A., COMPAGNIE GENERALE DES MATIERES NUCLEAIRES and COGEMA, INC.,

Plaintiffs-Appellees,

and

AD HOC UTILITIES GROUP,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant,

and

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Defendants-Appellants.

JUDGMENT

ON APPEAL from the United States Court of International Trade

in CASE NO(S). 02-CV-00219 and 02-CV-00234

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

DISMISSED

Appendix C

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED SEP 21 2007

APPENDIX D — FINAL DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED DECEMBER 21, 2001

FEDERAL REGISTER

Vol. 66, No. 246

Notices

DEPARTMENT OF COMMERCE

International Trade Administration

Import Administration

[A-427-818]

Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France

66 FR 65877

DATE: Friday, December 21, 2001

ACTION: Notice of final determinations of sales at less than fair value.

EFFECTIVE DATE: December 21, 2001.

Appendix D

FOR FURTHER INFORMATION CONTACT: Victoria Schepker or Edward Easton, at (202) 482-1756 or (202) 482-3003, respectively; AD/CVD Enforcement, Office 5, Group II, Import Administration, Room 1870, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to Department of Commerce (Department) regulations refer to the regulations codified at 19 CFR part 351 (April 2000).

Final Determination

We determine that low enriched uranium (LEU) from France is being sold, or is likely to be sold, in the United States at less than fair value (LTFV), as provided in section 735 of the Act. The estimated margins of sales at LTFV are shown in the Continuation of Suspension of Liquidation section of this notice.

Appendix D

Case History

The preliminary determination in this investigation was published on July 13, 2001. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Low Enriched Uranium from France*, 66 FR 36743 (July 13, 2001) (*Preliminary Determination*). The petitioners[1] and the respondent, Eurodif, S.A. (Eurodif), the sole producer of the subject merchandise, and its owner, Compagnie Generale des Matieres Nucleaires (Cogema) (collectively, Cogema/Eurodif or the respondent), filed case briefs on antidumping methodological issues on September 28, 2001, and rebuttal briefs on October 9, 2001. A rebuttal brief was also filed by the Ad Hoc Utilities Group (Ad Hoc Utilities Group or AHUG).[2]

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1. The petitioners in this investigation are USEC, Inc., and its wholly-owned subsidiary, United States Enrichment Corporation (collectively USEC); and the Paper Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-550 and Local 5-689 (collectively PACE).

2. The members of the Ad Hoc Utilities Group are: Arizona Public Service Co., Carolina Power & Light Co., Dominion Generation, Duke Energy Corp., DTE Energy, Entergy Services, Inc., Exelon Corporation, First Energy Nuclear Operating Co., Florida Power Corp., Florida Power and Light Co., Nebraska Public Power District, Nuclear Management Co. LLC (on behalf of certain member companies), PPL Susquehanna LLC, PSEG Nuclear LLC, South Texas Project, Southern California Edison, Southern Nuclear Operating Co., Union Electric Company, and Wolf Creek Nuclear Operating Corp.

Appendix D

A public hearing on the antidumping methodological issues was held on October 23, 2001.

On October 22 and 23, 2001, the petitioners, respondent, and the Ad Hoc Utilities Group filed briefs on common scope issues in the antidumping and countervailing duty investigations of low enriched uranium from France, Germany, the Netherlands and the United Kingdom. Rebuttal briefs on these common scope issues were filed on October 29, 2001, and a public hearing on the common scope issues was held on October 31, 2001. In response to a September 28, 2001 submission by the European Commission to Mr. Grant Aldonas, Under Secretary for International Trade, regarding the antidumping duty (AD) and countervailing duty (CVD) investigations of LEU from France, Germany, the Netherlands, and the United Kingdom, and Mr. Aldonas' November 7, 2001 reply to this letter and the November 22, 2001 submission from the European Commission, the petitioners, respondent and the Ad Hoc Utilities Group filed briefs that addressed the content of this correspondence.

This final determination was originally scheduled to be issued on November 26, 2001. On November 6, 2001, the Department tolled the final determination deadlines, until December 13, 2001, to accommodate a delayed verification and briefing and hearing schedule in the companion countervailing duty investigation, due to the events of September 11, 2001.

Appendix D

Amended Scope of Investigation

For purposes of this investigation, the product covered is all low enriched uranium (LEU). LEU is enriched uranium hexafluoride (UF_6) with a U^{235} product assay of less than 20 percent that has not been converted into another chemical form, such as UO_2, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).

Certain merchandise is outside the scope of this investigation. Specifically, this investigation does not cover enriched uranium hexafluoride with a U^{235} assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of this investigation. For purposes of this investigation, fabricated uranium is defined as enriched uranium dioxide (UO_2), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates (U_3O_8) with a U^{235} concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexafluoride with a U^{235} concentration of no greater than 0.711 percent are not covered by the scope of this investigation.

Also excluded from these investigations is LEU owned by a foreign utility end-user and imported into the United States by or for such end-user solely for purposes of conversion by a U.S. fabricator into uranium

dioxide (UO_2) and/or fabrication into fuel assemblies so long as the uranium dioxide and/or fuel assemblies deemed to incorporate such imported LEU (i) remain in the possession and control of the U.S. fabricator, the foreign end-user, or their designed transporter(s) while in U.S. customs territory, and (ii) are re-exported within eighteen (18) months of entry of the LEU for consumption by the end-user in a nuclear reactor outside the United States. Such entries must be accompanied by the certifications of the importer and end user.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to this proceeding is dispositive.

Scope Clarification

For further details, *see* Comment 2 of the "*Issues and Decision Memorandum for the Antidumping Duty Investigation of Low Enriched Uranium from France*" (*Decision Memorandum*) from Bernard T. Carreau, Deputy Assistant Secretary for Import Administration, to Faryar Shirzad, Assistant Secretary for Import Administration, dated concurrently with this notice.

Appendix D

Goods Versus Services

Applicability of AD/CVD Law

The Preliminary Determination

In the preliminary determinations in the LEU investigations, we determined that all LEU entering the United States from Germany, the Netherlands, the United Kingdom, and France is subject to the AD and CVD investigations on LEU regardless of the way in which the sales for such merchandise were structured. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Low Enriched Uranium from Germany and the Netherlands; and Postponement of Final Determinations*, 66 FR 36748, 36750 (July 13, 2001). We based our preliminary determinations on several factors. First, we found, and no party disputed, that LEU entering the United States constitutes a good, the tangible yield of a manufacturing operation. Moreover, under the U.S. Customs regulations, we recognized that any item within a tariff category for the Harmonized Tariff System constitutes merchandise for customs purposes. *See* 19 CFR 141.4 (2000). In this case, LEU is normally classified under HTSUS 2844.20.0020, but also satisfies three other HTSUS classifications described as enriched uranium compounds, enriched uranium, and radioactive elements, isotopes, and compounds.

Second, in our preliminary determinations we found it to be a well-established fact that the enrichment

process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. We found that no party disputes that the enrichment process constitutes substantial transformation of the uranium feedstock. We, therefore, preliminarily concluded that the LEU enriched and exported from Germany, the Netherlands, the United Kingdom and France are products of those respective countries, and are subject to these investigations.

Third, we found that there are significant volumes of LEU sold pursuant to contracts that expressly provide separate prices for SWU and feedstock (*i.e.*, contracts for enriched uranium product (EUP)), and that no party disputes that such sales constitute sales of subject merchandise. Rather, it is only those transactions in which utility companies obtain LEU through separate purchases of SWU and feedstock from separate entities that the Ad Hoc Utilities Group (AHUG) contends cannot be subject to the antidumping law. We preliminarily determined that there was little substantive commercial difference between the two types of transactions. We found that, simply because an unaffiliated customer purchases subject merchandise through two transactions, instead of a single transaction, does not mean that the merchandise entering the United States is not subject to the antidumping law.

Fourth, we preliminarily determined that, contrary to respondents' arguments, the tolling regulation does not provide a basis to exclude merchandise from the

scope of an investigation. Rather, we found that the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value. Thus, under the tolling regulation, the issue is not whether the LEU in question is subject to the antidumping law, but rather who is the seller of the subject merchandise for determining U.S. price and normal value or, more specifically, what is the appropriate way in which to value subject merchandise and foreign like product. To the extent that sales of subject merchandise are structured as two transactions, we stated that we would combine such transactions to obtain the relevant price of the subject merchandise.

Fifth, we preliminarily determined that enrichers are the sellers of LEU in both types of transactions-either as an exchange of SWU and uranium feedstock for cash, or as an exchange of SWU for cash and a swap of uranium feedstock. We preliminarily determined that regardless of whether the utility company pays in cash or in kind for the natural uranium content, the LEU is delivered under essentially the same contract terms, including warranties and guarantees pertaining to the complete LEU product. Second, enrichers do not use the uranium feedstock provided by the utility companies. Instead, the natural uranium is typically delivered shortly before, or even after, delivery of the LEU, making the delivery of such uranium a payment in kind for the natural uranium component of the LEU. Third, the utility company does not have control over the process used to produce the LEU that the utility

company receives. Rather, the enricher controls the manufacture of LEU, as demonstrated by the fact that the product assay under the contract (transactional assay) differs from the product assay produced and delivered by the enricher (operational assay). The enricher makes the decision of the particular product based upon its own operational requirements and inputs costs. We preliminarily determined that, taken together, these facts indicate that enrichers are in effect selling LEU under both types of contractual arrangements.

Discussion

For these final determinations, we have concluded that all LEU from the investigated countries entering the United States for consumption is subject to the AD and CVD laws. We have carefully considered all comments received on this issue in response to our preliminary determinations and, for the reasons stated below, do not find persuasive the arguments that the LEU at issue is exempt from the AD and CVD laws.

For these final determinations, respondents and AHUG are joined by the EC in raising again the issue of whether the AD and CVD laws can be applied to goods sold pursuant to contracts for the provision of enrichment. Respondents and AHUG contend that, under such contracts, LEU is not sold to, or in, the importing country. Respondents contend that, for these transactions, enrichment companies sell enrichment services, which is a component of LEU. Accordingly, for those entries of LEU, sold pursuant to SWU contracts,

these parties assert that the AD and CVD laws are not applicable because respondents are not selling subject merchandise and because there is no sale of subject merchandise in the United States.

In our view, respondents and AHUG have confused fundamental concepts concerning the application of the unfair trade laws. The AD and CVD laws were enacted to address trade in goods. Thus, respondents and AHUG have confused what is being sold in a particular transaction with what is being introduced into the commerce of the United States. The Department finds that the issue of whether merchandise entering the United States is subject to the AD and CVD laws depends upon whether the merchandise produced in, and exported from, a foreign country is introduced into the commerce of the United States.

In particular, the language of section 735(a)(1) of the Act states that "the administering authority shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value." *See also* section 731(1) of the Act. We have consistently interpreted these provisions to pertain to merchandise from the investigated country, and not to companies. *See Jia Farn Mfg. Co. v. United States,* 817 F. Supp. 969, 973 (CIT 1993) ("LTFV determinations and antidumping duty orders are rendered upon the subject merchandise from a certain country under the investigation."). In other words, AD and CVD cases proceed *in rem* (*i.e.*, against the good as entered), rather than *in personam* (*i.e.*, against the parties to the import transaction).

Similarly, in conducting countervailing duty investigations, section 701(a)(1) of the Act requires the Department to impose duties if, *inter alia*, "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

In these investigations, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that the LEU enriched in and exported from Germany, the Netherlands, the United Kingdom and France is a product of those respective countries.

Finally, we find, and no party disputes, that the LEU at issue enters into the commerce of the United States. Thus, the question of whether enrichers sell enrichment

processing, as compared to LEU, is not relevant to the issue of whether the AD and CVD law is applicable. Rather, it is only relevant in these investigations for purposes of determining how to calculate the dumping margin and how to determine who is the producer/seller of subject merchandise.

In seeking to equate what is being sold with a service that is beyond the scope of the AD and CVD laws, respondents and AHUG assert that the enrichment of uranium is akin to the cleaning of a suit.[3] They contend that a person who takes a suit to a cleaner and picks up a clean suit is merely paying for the service of cleaning. In the case of enrichment, they assert, a person provides natural uranium to an enricher who returns enriched uranium and is paid for the services.

We agree that a cleaner merely provides a service for which one is paid. However, we disagree with the appropriateness of the analogy used for purposes of understanding what is occurring in these cases. In the case of cleaning services, the cleaner merely returns to its customer a cleaned suit; no substantial transformation takes place, and no merchandise is being produced. Enrichment of uranium, however, is a critical step in the production of nuclear fuel. The production of uranium in the nuclear fuel cycle consists of five stages: mining, milling, conversion, enrichment, and fabrication. A distinct product is produced at each stage. Milled

3. *See* Respondents' Joint Case Brief, at 38, 39; *see also* Petitioners' Rebuttal Brief at 26.

uranium is converted into uranium hexafluoride. Uranium hexafluoride is used to produce enriched uranium. Enriched uranium is used to produce fuel rods. And fuel rods are used in nuclear-generating facilities to produce electricity. In the case of enrichment, it is uncontested that enrichment results in the production of two separate products: low enriched uranium and uranium tails (or depleted uranium which can be re-enriched to produce enriched uranium).

Respondents' and AHUG's reference to the term "services" in their arguments mischaracterizes the nature of the enrichment operations, and attempts to place a major manufacturing operation which produces merchandise squarely outside the realm of trade in goods, based solely upon the way in which particular sales of such merchandise are structured. We find, however, that regardless of whether the sale is structured as one of enrichment processing or LEU, in all cases the trade in LEU is a trade in goods, as the transactions in question result in the introduction of LEU into the commerce of the United States. Accordingly, the Department determines that all LEU produced in the investigated countries and entering the United States for consumption is subject to these investigations.

AHUG and respondents insist that the AD and CVD laws can only be applied where the sale of LEU occurs in a specific way (*i.e.*, where the merchandise is sold in a single transaction). AHUG further insists that the law is inapplicable because the utility companies cannot be

considered the sellers of subject merchandise since they do not sell LEU, but instead sell electricity to U.S. consumers. Accordingly, AHUG and respondents conclude that the law cannot apply because no entity sells the subject merchandise.

We disagree. It does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States. The first, and threshold, question we must ask is whether the merchandise entering the United States is subject merchandise. All else flows from this. The second question is what transaction does the Department look at to determine export price.

Further, we believe Congress intended the law to be applicable where the subject merchandise enters the commerce of the United States, even where the transaction for such merchandise does not take the form of a simple, single chain of commerce involving a solitary manufacturer/exporter, a single sales price, and a single unaffiliated purchaser in the United States. Congress enacted specific provisions that demonstrate a clear intent to make merchandise entering the United States subject to the law even though the sale by the exporter to the first unaffiliated purchaser is not a sale of subject merchandise. In constructed export price transactions involving further manufacturing, for example, subject

merchandise enters the United States, but through a process of further manufacturing, is often sold to the first unaffiliated purchaser in the form of non-subject merchandise. The form of the sale, however, does not prohibit the application of the law. To the contrary, to address those situations Congress enacted special provisions that require the Department to determine whether there are dumping margins and to apply duties, as appropriate, to such merchandise. *See* section 772(b) of Act. Even where the first sale to an unaffiliated purchaser is far removed from the subject merchandise that enters the commerce of the United States, such merchandise is covered under the law, and Congress enacted a specific provision establishing a basis for calculating export price. For example, where rollerchain constitutes the subject merchandise and enters the United States, but the first sale to an unaffiliated purchaser is the sale of a motorcycle that contains the rollerchain, the law is applicable to such entries of rollerchain. *See* section 772(e). *See also* SAA at 825.

While there is no specific statutory provision that dictates how the Department is to calculate the value of subject merchandise and the export price in the circumstances in these LEU investigations, the absence of such a provision does not render the law inapplicable where the facts demonstrate that the product in question enters into the commerce of the United States, as in this case.

Appendix D

Use of the Term "Enrichment Services" in Other Legal Contexts

In seeking to demonstrate that for the transactions at issue the enrichment companies provide enrichment services, perform a value-added service, and do not sell the subject merchandise, respondents contend that the U.S. government has advocated on behalf of USEC before U.S. domestic courts that enrichment contracts are contracts for services, and accordingly, that the Uniform Commercial Code (UCC), which only pertains to goods, does not apply to such contracts. Moreover, the parties contend that U.S. courts have ruled in USEC's favor, finding that the UCC did not apply to such transactions because they were sales contracts for services, not for goods. The parties conclude, therefore, that because the U.S. government has recognized that the sales in question are sales of services, to be consistent, the Department cannot apply the AD or CVD law to these transactions.

We do not view those determinations as relevant to the issue of whether LEU that enters the commerce of the United States is subject to the AD and CVD laws. The respondents and AHUG are mixing two entirely different statutory regimes, which play different roles and have different purposes. Other legal or regulatory regimes are not determinative of how the Department is to treat such transactions under the AD and CVD laws. For example, the court's finding in *Florida Power & Light Co.* v. *United States* that the transfer of title of uranium feedstock "does not rise to the level of

'procurement' or 'disposal' of property" was made in the specific context of determining the applicability of the Contract Disputes Act to government contracts and is not relevant, much less binding, for purposes of the application of the AD and CVD laws.[4] In *Barseback Kraft AB and Empress Nacional Del Urnaio, S.A.* v. *United States*, the court ruled that the UCC did not apply to the contracts at issue because the UCC does not apply to government contracts.[5] Moreover, the UCC addresses the rights and obligations of the parties to a specific contract, and is therefore not determinative of whether the overall trade is one involving goods or services. As a general principle, different terms can have different meanings under different statutes, and parties are entitled to make their claims pursuant to the case law and precedent of the particular relevant statute, even where those claims appear to be at odds with other claims made pursuant to the case law and precedent of another statute that has an entirely different purpose.

Tolling

Respondents and AHUG also seek to obtain an exemption under the law for the LEU at issue through the application of the Department's tolling regulation, set forth at 19 CFR 351.401(h).

We disagree with respondents'suggested interpretation for several reasons. First, we do not

4. 49 Fed. C1. 656 (2001) (No. 96-644C).

5. 36 Fed. C1. 691 (1996), *aff'd* 121 F.3d 1475 (Fed. Cir. 1997).

interpret section 351.401(h) of the Department's regulations to be relevant or applicable in determining whether merchandise entering the United States is subject to the AD and/or CVD laws. Instead, section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for purposes of determining whether the AD and/or CVD laws are applicable. *See* 19 CFR 351.401(a) (2000). Our interpretation that the tolling regulation is intended solely for purposes of calculating dumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

Furthermore, in practice, we have never applied, nor relied upon, section 351.401(h) to exempt merchandise from AD proceedings, nor have we ever applied the provision in CVD proceedings. Moreover, our application of the tolling regulation in *SRAMs from Taiwan* does not support AHUG's or respondents' claim for exemption from the AD and CVD laws.[6] In that case, we applied the tolling regulation, seeking to determine which party made the relevant sale of subject merchandise. We found that the U.S. design house made sales of subject merchandise to unaffiliated purchasers in the United States, and therefore based our determination of U.S. price and normal value upon the transactions made by

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6. *Static Random Access Memory Semiconductors From Taiwan: Redetermination on Remand*, (May 2, 2000). The text of this determination can be found on the Department's Internet site at http://ia.ita.doc.gov/remands/00-48.htm.

the U.S. design house. In that case, we applied AD duties to all entries of *SRAMs from Taiwan*, regardless of whether the U.S. design house or the Taiwan exporter made the sale of subject merchandise. Therefore, our decision in *SRAMs from Taiwan* establishes no basis for excluding the LEU in question from these investigations. Further analysis of the tolling regulation in these antidumping investigations for purposes of determining EP, CEP and NV is provided below.

Temporary Import Bonds, Foreign Trade Zones, and American Goods Returned

Respondents also cite the Department's treatment of subject merchandise entering the United States under Temporary Import Bonds (TIBs), into Foreign Trade Zones (FTZs), and as American Goods Returned, as examples of where subject merchandise enters the United States without being subject to duties, and to support their claim that the Department is not authorized to impose duties on subject merchandise unless there is a sale of such merchandise. However, these provisions cited by respondents are not instances in which the merchandise enters the United States for consumption without the imposition of AD and countervailing duties. By operation of law, goods entered under TIBs are prohibited from entering the United States for consumption. For FTZs, where the merchandise enters the United States for consumption, antidumping and countervailing duties are imposed. *See* 15 CFR 400.33(b)(2)(2000). The Department's treatment of goods entering FTZs or under TIBs is,

therefore, consistent with the practice that the AD and CVD laws apply to goods that enter the commerce of the United States.

With respect to American Goods Returned (AGR), this provision is only applicable to merchandise that has not been substantially transformed in another country. AGR only applies to U.S. merchandise that is further manufactured in minor respects in another country, such that the product that is returned to the United States is not substantially transformed. As discussed below, this provision is not applicable in this case.

Substantial Transformation and Country of Origin

Respondents also argue that the Department's country-of-origin rationale in this case is contrary to federal and international regulation of transactions involving uranium and enrichment services. Respondents state that the enrichment process does not wipe away the country of origin of the uranium; rather it remains the same for materials tracking purposes after enrichment as it was before enrichment. Respondents conclude that it is irrelevant that enrichment is a major manufacturing process and that the enrichment process constitutes substantial transformation of the uranium feedstock. Accordingly, respondents contend that the Department's conclusion as to the country of origin of the enrichment cannot be used to establish the country of origin of the unitary LEU, because LEU itself has two countries of origin, namely the country of origin of the uranium and that of the separative work unit.

We disagree. The Department's country-of-origin determinations are made pursuant to the agency's authority to determine the scope of its investigations and AD/CVD orders. In contrast, the federal and international regulation of transactions in uranium referred to by respondents reflect requirements adopted for purposes of non-proliferation. Thus, the Nuclear Regulatory Commission (NRC) tracks the origin of natural feedstock for the purpose of tracing the worldwide movement and ultimate disposition of the feedstock, while the U.S. Customs Service and the Department determine the country of origin for the merchandise entering the United States for purposes of tracking international commercial transactions and assessing duties. The NRC has no role in determining the country of origin for customs duty purposes. Moreover, the Department and the Customs Service make country-of-origin determinations for the product entering the United States, which in this case is LEU, not feedstock and SWU, as respondents suggest. Indeed, the Department has in the past determined in other proceedings covering uranium that the process of enrichment constitutes substantial transformation of the uranium, and therefore, that enrichment confers country of origin upon the product entering the United States for AD purposes.

In the current case, petitioners have indicated, and no party has disputed, that the enrichment of uranium accounts for approximately 60 percent of the value of the LEU entering the United States. We find that enrichment processing adds substantial value to the

natural uranium and creates a new and different article of commerce and therefore confers a different country of origin upon the product for purposes of the AD and CVD law.

As a final matter, the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness of the AD and CVD laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading system as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the AD and CVD laws.

While the term "enrichment services" is common in the industry, the enrichment of uranium feedstock is no more a "service," as that term is normally understood in the international trading community, than a production process that results in the manufacture of textiles, semiconductors, or corrosion-resistant steel. An importer of textiles who provides yarn to a textile manufacturer may view the transaction as nothing more than the purchase of "weaving services." An importer of semiconductors who provides a patented design mask to a foundry to be pressed into a wafer for purposes of

making a microchip may view such a transaction as nothing more than the purchase of "pressing services." Similarly, an importer of corrosion-resistant steel who provides hot-rolled steel to a rolling mill may view the transaction as nothing more than the purchase of "rolling and coating services."

Yet, no matter what the purchaser chooses to call the transaction, and no matter what terms may be common in the industry, nothing can change the fundamental facts associated with all of these transactions. In each of these three cases, the purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product. We simply do not consider a major manufacturing process to be a "service" in the same sense that activities such as accounting, banking, insurance, transportation and legal counsel are considered by the international trading community to be services. Instead, we have always considered the output from manufacturing operations that result in subject merchandise being introduced into the commerce of the United States to be a good. The only questions we have grappled with in all these instances is who is the appropriate producer/seller of the merchandise and how to calculate export price and constructed export price.

While respondents and AHUG note that the practice in the uranium industry with respect to the transactions at issue was established long before the Department

initiated these investigations, in the Department's view, the issue we are addressing is unfair trade practices. In the Department's view, nothing in the statute in any way indicates that Congress did not intend the AD and CVD laws to be applicable to merchandise based upon the way in which parties structure their transactions for such goods entering the commerce of the United States.

In sum, the application of the AD and CVD laws does not depend upon whether a producer/exporter sells an input to the subject merchandise, or the subject merchandise itself, but rather whether the activities of the producer/exporter result in the subject merchandise being introduced into the commerce of the United States.

Calculating Export Price, Constructed Export Price and Normal Value Comments of the Parties

Respondents and AHUG contend that the Department must base its evaluation of dumping upon sales of the subject merchandise, which should reflect all elements of the merchandise's value. In terms of EP and CEP, these parties contend that the statute refers to the price at which the merchandise is sold by the producer or exporter. In addition, AHUG and respondents cite to the agency's decision in *SRAMs from Taiwan*, where the Department determined that the relevant sale under the tolling regulation must be the sale of subject merchandise reflecting the full value of such merchandise.

Appendix D

AHUG and respondents contend that the principles for determining which sales are relevant, as embodied in the tolling regulation and applied in the *SRAMs* case, are directly pertinent to deciding whether the sale of enrichment services by the respondents, and sales of services in general, can be treated as relevant for purposes of the AD law. These parties assert that the Department should determine that: (1) The enrichment companies do not produce or take title to the uranium feedstock; rather it is supplied to them in bailment; (2) the sale of enrichment does not constitute the relevant sale for purposes of determining EP and CEP because the sales in question do not reflect the full value of the subject merchandise; and (3) the respondents are not in a position to set the price of the product because such companies have no control over the full cost of LEU for the transactions at issue.

Petitioners respond that the respondents and AHUG place heavy emphasis on the Department's "relevant sale" discussion in the *SRAMs* case, which petitioners contend was not intended to provide the guiding precedent in a case where the U.S. customer obtains the raw materials in one transaction and exchanges them for finished goods in another transaction, as in these investigations. The petitioners state that the respondents' and AHUG's position is erroneous in claiming that the Department's redetermination in *SRAMs* compels the conclusion that the enricher does not make the "relevant sale" because its price does not include all of the cost components of the finished product. Moreover, they add, even if SWU transactions were

tolling transactions, the Department's tolling precedent does not establish that tolling transactions are outside the scope of the AD law.

Petitioners further contend that the fact that enrichers have control over the production process used to produce LEU under SWU contracts is relevant to the Department's determination with respect to the relevant sale, and contrary to the arguments raised by respondents and AHUG. Petitioners add that the issue of who controls the production of the finished product is a key factor in determining whether a party is a producer or toller.

With respect to the sales contracts, in their case brief, petitioners argued that the enrichers are actually sellers of LEU under both SWU and EUP contracts because in both arrangements the LEU is produced at an operating tails assay determined by the enricher, and therefore the enricher determines the amount of feed used, the amount of SWU actually applied, and the assay of the tails that will be produced. Petitioners further noted that, although a customer may designate a transactional tails assay in a SWU contract, but not in an EUP contract, there is not a significant difference. To illustrate this point, petitioners note that, by designating a transactional tails assay in a SWU contract, the customer determines only the amount of uranium feedstock it must provide to the enricher, and the amount per SWU the customer will pay. However, the customer's designation of the transactional tails assay does not determine the amount of uranium

feedstock used by the enricher or the amount of SWU actually used by the enricher. Petitioners maintain that this is determined by the operational tails assay used by the enricher in the production of LEU. Petitioners assert that enrichers operate in essentially the same manner when they produce LEU under contracts where the customers supply the uranium feedstock as they do when they produce LEU from their own uranium feedstock.

Respondents reject petitioners' assertion that enrichers are actually sellers of LEU based upon the utility's delivery of uranium feed material as a payment-in-kind of uranium for the natural uranium component of the LEU. Respondents contend that enrichment services contracts contain detailed payment terms, and establish a price for the enrichment services sold, but do not contain any provisions for a payment of uranium in any form. Respondents add that it is virtually impossible for a payment-in-kind to occur because title does not pass to the enricher while the uranium is being enriched. Moreover, they explain that if a payment of uranium were occurring, the enricher would have to recognize it as a payment in its financial statements, which they assert does not occur, as the Department verified. Finally, respondents note that, by adopting the payment-in-kind theory, the Department would create a contractual arrangement between parties that completely differs from the contract itself.

Respondents further dispute the petitioners' conclusion that the enricher's return of different

uranium rather than the exact material provided by the customer turns the transaction into a payment-in-kind. Respondents argue that, in determining whether a service is being performed, one must look at the essence of the transaction, and what the customer contracted to purchase, not what material is given back to the utility company. Furthermore, they state, because uranium is fungible, it makes no sense to require firms to identify each atom of uranium transported or processed. They note that, in a previous submission by the petitioners, USEC explicitly stated that uranium is a fungible commodity and that a fabricator may use its own inventory of enriched uranium or have enriched uranium delivered by other utility companies.

In addition, respondents contend that the Department did not base its dumping margin calculations upon the number of SWUs or the price per SWU, but instead treated the sale as if it were a sale of LEU. Respondents note that the Department's price calculation is based upon the quantity of uranium and the quantity of SWUs involved, which has no correlation with the agreed upon price per SWU. Respondents contend that in doing so the Department is changing the material terms fixed on the date of sale into one in which the terms are not fixed until a later date, and then unilaterally, by notification from the customer. Respondents contend that this violates the statutory requirement that the Department base its calculation on the actual costs reflected in the respondent's books and records, ignores the long-standing practice of making AD comparisons on a production or process-

neutral basis, and uses a methodology that is completely contrary to the date of sale methodology applied by the Department in the same cases.

Respondents also note that the Department assigned a value to the natural uranium in the Preliminary Determinations where no price was provided, notwithstanding that the uranium provided by the utility company was not a cost to the enricher, and was not charged to the customer at all. Respondents contend that the surrogate uranium cost that the Department used violated the statutory requirement that it base its calculation on the actual costs incurred. They reiterate that the cost of the uranium to the enricher is zero. The respondents add that, although the uranium is processed, it is never paid for by the enricher, nor is it considered revenue, nor does it appear in the enricher's books. Therefore, they contend, uranium may not be treated as a cost when calculating constructed value.

AHUG also contends that the SWU contracts are unequivocally contracts for services, arguing that the enrichers hold the LEU as bailees for their utility customers, and if a particular delivery of LEU does not contain the exact same physical feed as that delivered by the utility, it contains feed delivered to the enricher by another utility. Therefore, AHUG asserts, the fungibility of the feed does not alter the actual commercial terms of the contracts or the nature of the transaction.

AHUG also disagrees with the Department's preliminary determination that there is little commercial difference between EUP and enrichment contracts. AHUG contends that enrichment contracts require payment for enrichment services, and therefore, the contract does not reflect all elements of the value of the LEU delivered, as do the EUP contracts. Furthermore, AHUG contends that LEU production is usually arranged through three, not two transactions: the purchase of U3O8, a contract for conversion services, and a contract for enrichment services. In addition, AHUG argues that the Department proposes that U.S. utility contracts for the purchase of each of these components can be cumulated to derive an unfair price even in the absence of a sale of that LEU in the U.S. market that reflects all elements of its value. AHUG argues that this theory seems to state that when utility companies arrange for the production of LEU through these separate contracts, they are selling LEU to themselves. AHUG asserts that the Department is simultaneously attempting to attribute the utilities' transactions with the mining companies and the conversion service providers to the enrichers, even though the enrichers are not parties to those other transactions, have no control over the process, and receive none of the revenue from such sales. AHUG claims this theory cannot be supported.

Petitioners respond that, contrary to respondents' and AHUG's contentions, the contractual obligation of a customer in a SWU transaction to supply converted uranium is properly viewed as part of the *quid pro quo*

that the customer must provide in order to obtain LEU from the enricher. Petitioners add that there can be no question that provision of the natural uranium is like the payment of the cash price for the SWU, a contractual obligation that must be met by a utility purchaser under a SWU contract in order to acquire a wholly new product, *i.e,* LEU from the enricher.

Petitioners note that, in the preliminary determinations, the Department identified three factors that petitioners had cited in support of its position. First, with respect to warranties and guarantees, LEU and EUP are delivered under essentially the same type contract. Second, the enrichers do not use the specific feedstock supplied by a particular customer to produce LEU for that customer. Third, the enrichers, not the utility companies, control the process used to produce the LEU under either type of contract. Petitioners state that, contrary to respondents' criticism of the "essentially identical" language in the preliminary determinations, the Department was not saying that SWU and EUP contracts were identical in every respect, nor is it necessary for the Department to so find.

Respondents reject petitioners' arguments on whether the enricher controls the production process, arguing that the relevant question is not whether enrichers own and control the production process for LEU, but rather whether the customer is purchasing a service. Respondents add that, because the quantity of uranium feedstock to be supplied by the customer is set pursuant to the contract, for a specified tails assay, the

customer, not the enricher, has the control over its cost of supplying uranium feedstock.

Discussion

For these final determinations, we find that the enrichment companies are the only producers and exporters of the subject merchandise in these cases and, therefore, are the appropriate respondents for determining EP, CEP and NV. We will address the application of the Department's tolling regulation first, and then the nature and substance of the sales contracts at issue.[7]

Tolling

In establishing general rules for calculating EP, CEP and NV, we promulgated section 351.401(h) of our regulations to address the treatment of subcontractors and tolling operations under the AD law.[8] The purpose of the regulation is to enable the Department to identify

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7. This discussion addresses the concepts of export price, CEP, and who is the producer/exporter of the subject merchandise-all issues that are relevant under the antidumping law. We note that, under the countervailing duty law, section 771(5)(E)(iv) defines as a benefit the purchase of goods for more than adequate remuneration. Because we have determined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods.

8. *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27295, 27411 (May 19, 1997).

the appropriate seller of subject merchandise and foreign like product for purposes of calculating EP, CEP and NV. *SRAMS from Taiwan* ("The company that is the first "price setter" for subject merchandise is also the company that is the producer of the merchandise."). To that end, the tolling regulation states that the Department will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor (i) does not acquire ownership of the subject merchandise; and (ii) does not control the sale of subject merchandise. 19 CFR 351.401(h) (2000).

Department Precedents

In *SRAMs from Taiwan*, the key case relied upon by the respondents and AHUG, we addressed the issue of whether producer status should be conferred upon the U.S. design house or the Taiwan foundry. In that case, the issue for the Department was which sale—the sale by the design house or the sale by the foundry—should be used to calculate EP and CEP. The Department stated that "the "relevant sale" must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production." *Id.* at 4.

In making the distinction between the sale by the foundry and the sale by the U.S. design house, we examined the role played by the foundries and design houses in the production of subject SRAMs, as well as

the nature of the product produced. We found that the design was not only an important component of the product, but in fact defined the essence of the finished product. Because the design house not only developed the design, but also controlled how it was used in production by the foundry and the way that the products incorporating it were distributed in the marketplace, the Department concluded that the design house directed the production of the subject merchandise. *Id.* at 5. In our view, the role played by each entity as well as the nature of the product produced are important considerations in identifying the appropriate party as the producer of the subject merchandise.

In addition, since the enactment of the tolling regulation, the Department has also recognized that the regulation "does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan: Final Results of Antidumping Duty Administrative Review,* 63 FR 32810, 82813 (June 16, 1998). In that case, we acknowledged that, in assessing whether a company is a producer, we are not restricted to the four corners of the sales contract. Moreover, we emphasized that we will make our decision as to whether a party is a producer or manufacturer for purposes of determining EP, CEP and NV based upon the totality of the circumstances. *Id.* In *Polyvinyl Alcohol from Taiwan,* we further recognized that, while examining the production activities of a party may not be decisive in every case, whether a party has engaged directly or indirectly in some aspect of production is an important consideration in identifying the appropriate party as the producer. *Id.* at 32814.

Appendix D

Enrichment Companies Are Producers/Exporters of LEU

In this case, we have determined that the enrichment companies are the producers and exporters of the subject merchandise for purposes of establishing EP, CEP and NV for several reasons. First, the enrichment process is such a significant operation that it establishes the fundamental character of LEU. Second, the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation. Third, utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise. Finally, we find that the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU. Each element is discussed further below. While no single factor is dispositive of our determination, on balance we have determined that the enrichment companies are the producers and exporters of the subject merchandise.

First, in this case it is the enricher who creates the essential character of the LEU. The enrichment process is not merely a finishing or completion operation, but is instead the most significant manufacturing operation involved in the production of LEU. Enrichment raises to a specified assay the level of U235 contained in the product. While the types of advanced technology used to perform this operation vary, without the enrichment process, one would not be able to separate the molecules necessary to produce LEU. Like the design mask in *SRAMs*, the enrichment process establishes the

essential features of the LEU, creating a clearly distinct product from uranium feedstock. Moreover, the enrichment process imparts the essential character of the product, LEU, and delineates the purpose for which the product is to be used. As noted above, LEU is a product for which there is virtually no alternative commercial use but as part of the nuclear fuel cycle. Without the enrichment of natural uranium, LEU could not be produced.

There are currently two technologies in use to enrich feedstock, gaseous diffusion and centrifuge. Each method requires a huge financial investment in facilities and a technically skilled work force. In fact, the centrifuge technology has been years in the making and has required millions of dollars in research. So highly specialized is it, and so expensive to develop, that three major European governments combined their resources to develop the technology and create Urenco. While there are hundreds of nuclear facilities around the world that require LEU for fabrication into fuel rods in order to operate their reactors, there are only five major enrichers in the world. This underscores the technological sophistication and expense required to enrich uranium into LEU. Adding to the expense and complexity of establishing an enrichment operation is an intricate web of national and international regulatory regimes and oversight commissions.

Enrichment facilities are similar to design houses in the semiconductor industry. It is the patented design of the mask that incorporates the intellectual property,

accounts for a substantial portion of the value, and constitutes the essence of the microchip. The design is what makes the chip and what gives it its unique function: storing memory and thus enabling a computer to operate. Just as the design imparts the essential characteristics of a microchip, enrichment imparts the essential characteristics of LEU.

Second, we find that enrichers not only have complete control over the enrichment process, but in fact control the level of usage of the natural uranium provided by the utility company. We are aware that SWU is universally defined as the standard measure of enrichment services. However, the definition of SWU further provides that it is the effort expended in separating a specified amount of feed into a specified amount of enriched uranium at a specified product assay and a specified amount of waste at a specified assay. In each of the contracts, while the amount of LEU being purchased is not expressly stated (unless it is an EUP contract) the product assay, tails assay, and number of SWU are specified. It is the precise combination of the product assay order and the number of SWUs specified in the SWU contract that results in an exact amount of LEU to be delivered over the life of the contract. The most important factor in determining whether the contract is fulfilled is whether the utilities receive the precise amount of LEU that results from the application of the SWU equation that is explicitly spelled out and agreed upon in the SWU contract. And it is this bottom line (*i.e.*, a precise amount of LEU delivered over the life of the contract) that forms the fundamental nature

of the agreement between buyer and seller in a SWU contract. With this understanding in mind, the enricher then has extraordinary leeway in determining the precise combination of SWU and feedstock to be used in the production of the LEU required by the SWU contract. The enricher's decision will depend upon such factors as the relative costs of electricity, feedstock, even the market price of "SWU," which, for all intents and purposes, trades like a commodity. As the record reflects, enrichers therefore run their facilities in a manner that they determine is most efficient.

For example, an enricher, in fulfillment of a SWU contract, may actually use more or less natural uranium and more or less SWU than is provided for in the contract (and by the utility customer). The enricher has complete control over these important production decisions. The utility company, on the other hand, provides the specifications and receives a product, as specified in the contract through the application of the SWU equation. Thus, the utility company obtains no more control over the production process than any customer who orders custom-made merchandise would obtain. In our view, the enricher has extensive control over the production process, and complete control over the amount of SWU or feed to be used in any given transaction. The extensive control further demonstrates that the enricher is not acting in a tolling capacity for the transactions at issue.

Third, in this case, the U.S. utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise. Unlike the U.S.

design house in *SRAMs from Taiwan*, but like the U.S. importer in *Polyvinyl Alcohol from Taiwan*, the U.S. utility companies perform no manufacturing function whatsoever with respect to the production of LEU. These companies have no LEU manufacturing operations; no capital investment in production facilities; no employees dedicated to manufacturing LEU; and add no value to the product through the performance of manufacturing operations. Most important, we find that the utility companies are the only purchasers of LEU and can only obtain LEU from enrichment companies. By contrast, enrichment companies' sole activity is to produce LEU for use by utility companies.

Finally, we find that the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU. The parties have made a comprehensive comparison of the terms of the contracts for SWU and EUP, arguing that the terms of the contract demonstrate that the contracts designated as SWU sales are not, in fact, sales of LEU. While we recognize that the provision of uranium feedstock may not be a payment-in-kind in the formal sense under these contracts, we maintain that the arrangement between buyer and seller in a SWU contract nonetheless is dedicated to the delivery of LEU, and critical to the trade in LEU. In reaching this conclusion, we have looked beyond the four corners of the contract and have examined the totality of the circumstances surrounding the transactions in deciding which sale is a valid representation of subject merchandise.

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The Nature of the SWU Contract

In this case, based upon the way in which the industry produces and sells LEU, we find that the overall arrangement between the parties indicates that enrichment companies are engaged in selling, and utility companies are engaged in purchasing, LEU. These transactions may be construed differently in other contexts, such as for purposes of taxation, or for purposes of establishing the liabilities of the parties to the contract. However, for purposes of calculating a price for LEU, based upon our examination of the overall circumstances of the arrangement under both types of contracts, we find that the contracts designated as SWU contracts are functionally equivalent to those designated as EUP transactions.

First, both types of transactions have one fundamental objective—the delivery of LEU at a specific time and location, with a specific product assay, as agreed upon in the contract, under the same warranties and guarantees that apply to all LEU delivered by respondents. Second, utility customers are not concerned with how LEU is produced or the amount of work expended (SWU) to produce such LEU. Instead, utility customers are interested in obtaining a specific quantity of a standardized product at a specified product assay. This pertains to both types of transactions. Indeed, SWU contracts are based upon a set formula that provides the utility company with a fixed quantity of LEU over the life of the contract.

Further, under both types of contracts, because the LEU is produced at an operating tails assay determined by the enricher, the enricher ultimately determines how much uranium feed is used, the amount of SWU actually applied, and the assay of the tails that will be produced. Thus, it is clear that enrichers not only exercise the same level of control over the production process for both types of contracts, but also perform the exact same manufacturing operations, regardless of whether the sale was made under a SWU contract or an EUP contract.

In addition, there are provisions in SWU contracts that further demonstrate that the underlying arrangement is designed to operate in much the same manner, regardless of the type of contract, and that whether the enricher or the utility company provides the uranium feedstock does not substantially alter that arrangement. These provisions are proprietary. *See, e.g.*, Urenco Business Proprietary Section A Response, Volume 1, Tab B1, Contract section F.3. Furthermore, for both types of contracts ownership of the LEU is only transferred to the utility customer upon delivery of the LEU. Consistent with this provision, for both types of transactions, the enricher incurs the risk of loss with respect to the LEU. In light of the above, therefore, we believe, as a practical matter, that the arrangement between the utility company and the enricher under a SWU contract is functionally equivalent to the arrangement under an EUP contract for purposes of determining EP and CEP.

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Moreover, as discussed above, the enrichment companies engage in the most significant portion of the production of LEU, and thus the value of enrichment is beyond question the most significant element of value in determining the price of LEU. In addition, LEU, the subject merchandise, is the merchandise resulting from this production operation. Accordingly, we believe the pricing behavior of the enrichment companies in these transactions is relevant to the Department's determination of whether the LEU in question is introduced into the commerce of the United States at less than fair value.

Therefore, because the pricing behavior of the enrichers in these transactions is relevant to the Department's determination and because the arrangement between the utility company and the enricher under a SWU contract is functionally equivalent to the arrangement under an EUP contract for purposes of determining EP and CEP, we have included these sales in our determination of EP and CEP in these investigations.

In assigning a specific monetary value to the natural uranium component, we estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For example, for any given shipment pursuant to a SWU contract we determined the quantity

(*i.e.* kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per-kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

Period of Investigation

The period of investigation (POI) is October 1, 1999, through September 30, 2000. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition (*i.e.*, December 2000).

Verification

As provided in section 782(i) of the Act, we conducted verification of the sales information submitted by Cogema/Eurodif from July 23 through July 27, 2001, in France, and from August 13 through August 16, 2001, in the United States. We conducted verification of the constructed value (CV) information submitted by Cogema/Eurodif from July 30 through August 3, 2001. We used standard verification procedures including examination of relevant accounting and production records, and original source documents provided by the respondent.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this antidumping proceeding are listed in the

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Appendix to this notice and addressed in the *Decision Memorandum* for this investigation, dated December 13, 2001, which is hereby adopted by this notice. The *Decision Memorandum* for this case is on file in room B-099 of the main Department of Commerce building. In addition, a complete version of the *Decision Memorandum* can be accessed directly on the World Wide Web at http://ia.ita.doc.gov/frn/summary/list.htm. The paper and electronic versions of the *Decision Memorandum* are identical in content.

Changes Since the Preliminary Determination

Based on our findings at verification and analysis of comments received, we have made adjustments to the calculation methodology in calculating the final dumping margins in this proceeding. These adjustments are discussed in detail in the *Calculation Memorandum,* dated December 13, 2001. For the final determination, we made the following revisions:

(1) We adjusted the transportation insurance amounts to account for the respondent's clerical errors.

(2) We adjusted movement expenses and U.S. duty charges for certain deliveries to correct the respondent's clerical errors.

(3) We revised the inventory carrying costs for various U.S. deliveries to account for the respondent's clerical errors.

(4) We adjusted the total cost of manufacturing reported in the U.S. sales database to be consistent with changes made to the total cost of manufacturing in the constructed value (CV).

(5) To reflect the opportunity cost of a particular contract provision exercised by one customer, we calculated an imputed expense and applied it to the indirect selling expense ratio of that customer, for all deliveries to the customer.

(6) Based on the respondent's revised calculation from verification, we adjusted the home market indirect selling expense ratio used to calculate indirect selling expenses added to CV.

(7) We recalculated the defluorination expenses included in CV based on the tails produced during the POI.

(8) We excluded purchased LEU from the calculation of the weighted-average cost of LEU produced in the POI.

(9) We recalculated the financial expense rate based on the financial statements of CEA Industrie, the entity that consolidates Cogema's accounts.

(10) We recalculated selling, general and administrative expenses to include certain research and development expenses.

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Final Determination of Investigation

We determine that the following weighted-average percentage dumping margins exist for the period October 1, 1999, through September 30, 2000:

Manufacturer/exporter	Margin (percent)
Cogema/Eurodif	19.57
All Others	19.57

Continuation of Suspension of Liquidation

Pursuant to section 735(c)(1)(B) of the Act, we are instructing the U.S. Customs Service to continue to suspend liquidation of all entries of LEU from France that are entered, or withdrawn from warehouse, for consumption on or after July 13, 2001 (the date of publication of the *Preliminary Determination* in the **Federal Register**). The Customs Service shall continue to require a cash deposit or the posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. The suspension of liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of

our determination. As our final determination is affirmative, the ITC will determine, within 45 days, whether imports of subject merchandise are causing material injury, or threaten material injury, to an industry in the United States. If the ITC determines that material injury or threat of injury does not exist, the proceedings will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping order directing Customs Service officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: December 13, 2001.

Faryar Shirzad,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

1. Common antidumping and countervailing duty scope issues

2. Amendment of the scope to exclude imported enriched uranium consumed in the conversion or fabrication of exported uranium

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3. Double-counting the subsidy in the calculation of the dumping margin

4. Treatment of "blended price" contracts

5. Calculation of the less than fair value (LTFV) margin based on delivered and undelivered sales

6. Valuation of electricity as a component of low enriched (LEU)

7. Whether to collapse Eurodif and Cogema

8. Whether defluorination costs are at arm's length

9. Accrual for tails disposal

10. Calculation of a constructed export price (CEP) offset

11. Recalculation of inventory carrying costs

12. Imputing certain expenses to Cogema/Eurodif

13. Selling, general and administrative (SG&A) expenses

14. Financial expenses

15. Purchased product

16. Constructed value (CV) profit

[FR Doc. 01-31509 Filed 12-20-01; 8:45 am]
BILLING CODE 3510-DS-P

APPENDIX E — AMENDED FINAL DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED FEBRUARY 13, 2002

FEDERAL REGISTER

Vol. 67, No. 30

Notices

DEPARTMENT OF COMMERCE

International Trade Administration

Import Administration

[A-427-818]

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Low Enriched Uranium From France

67 FR 6680

DATE: Wednesday, February 13, 2002

EFFECTIVE DATE: February 13, 2002.

FOR FURTHER INFORMATION CONTACT: Vicki Schepker or Edward Easton, Group II, Office 5, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th

Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-1756, (202) 482-3003, respectively.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department of Commerce (the Department) regulations refer to the regulations codified at 19 CFR part 351 (April 2000).

Scope of Order

For purposes of this order, the product covered is all low enriched uranium (LEU). LEU is enriched uranium hexafluoride (UF_6) with a U^{235} product assay of less than 20 percent that has not been converted into another chemical form, such as UO^2, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced (including LEU produced through the down-blending of highly enriched uranium).

Certain merchandise is outside the scope of this order. Specifically, this order does not cover enriched uranium hexafluoride with a U^{235} assay of 20 percent or greater, also known as highly enriched uranium. In addition, fabricated LEU is not covered by the scope of

this order. For purposes of this order, fabricated uranium is defined as enriched uranium dioxide (UO^2), whether or not contained in nuclear fuel rods or assemblies. Natural uranium concentrates (U_3O_8) with a U^{235} concentration of no greater than 0.711 percent and natural uranium concentrates converted into uranium hexafluoride with a U^{235} concentration of no greater than 0.711 percent are not covered by the scope of this order.

Also excluded from this order is LEU owned by a foreign utility end-user and imported into the United States by or for such end-user solely for purposes of conversion by a U.S. fabricator into uranium dioxide (UO_2) and/or fabrication into fuel assemblies so long as the uranium dioxide and/or fuel assemblies deemed to incorporate such imported LEU (i) remain in the possession and control of the U.S. fabricator, the foreign end-user, or their designed transporter(s) while in U.S. customs territory, and (ii) are re-exported within eighteen (18) months of entry of the LEU for consumption by the end-user in a nuclear reactor outside the United States. Such entries must be accompanied by the certifications of the importer and end user.

The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States (HTSUS) at subheading 2844.20.0020. Subject merchandise may also enter under 2844.20.0030, 2844.20.0050, and 2844.40.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise is dispositive.

Appendix E

Amended Final Determination

In accordance with section 735(a) of the Act, on December 21, 2001, the Department published its affirmative final determination of the antidumping duty investigation of low enriched uranium from France (*Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium from France*, 66 FR 65877). On December 26, 2001, we received ministerial error allegations, timely filed pursuant to § 351.224(c)(2) of the Department's regulations, from the petitioners[1] regarding the Department's final margin calculations. On December 31, 2001, we received rebuttal comments from the respondent, Compagnie Generale des Matieres Nucleaires (Cogema) and Eurodif, S.A. (Eurodif).

The petitioners allege that the Department should recalculate Eurodif's general and administrative (G&A) expense, by using Eurodif's, rather than Cogema's, cost of goods sold as the denominator in the calculation. The respondent argues that the petitioners' allegation is a substantive issue that cannot be treated under the ministerial error provision.

In accordance with section 735(e) of the Act, we agree that a ministerial error in the calculation of the G&A expense ratio was made in our final margin calculation.

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1. The petitioners in this investigation are USEC, Inc., and its wholly-owned subsidiary, United States Enrichment Corporation (collectively USEC); and the Paper Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO, CLC, Local 5-550 and Local 5-689 (collectively PACE).

For a detailed analysis of this allegation, and the Department's determination, see the January 10, 2001, Memorandum to Bernard T. Carreau from Constance Handley, regarding the *Amended Final Determination in the Antidumping Duty Investigation of Low Enriched Uranium from France: Ministerial Error Allegations* on file in room B-099 of the Main Commerce building. This determination is based on a reexamination of the G&A expense calculation.

We are amending the final determination of the antidumping duty investigation of low enriched uranium from France to correct the ministerial error. The revised final weighted-average dumping margins are shown below.

Antidumping Duty Order

On February 4, 2002, in accordance with section 735(d) of the Act, the International Trade Commission (ITC) notified the Department that a U.S. industry is materially injured within the meaning of section 735(b)(1)(A) of the Act by reason of imports of low enriched uranium from France.

Therefore, antidumping duties will be assessed on all unliquidated entries of low enriched uranium from France entered, or withdrawn from warehouse, for consumption on or after July 13, 2001, the date on which the Department published its preliminary affirmative antidumping duty determination in the **Federal Register** (66 FR 36743), and before January 9, 2002, the date the

Department instructed the U.S. Customs Service to discontinue the suspension of liquidation in accordance with section 733(d) of the Act, and on all entries and withdrawals of subject merchandise made on or after the date of publication of this antidumping duty order in the **Federal Register**. Section 733(d) states that the suspension of liquidation pursuant to a preliminary determination may not remain in effect for more than four months, unless exporters representing a significant proportion of exports of the subject merchandise request that the period be extended to not more than 6 months. As noted in the preliminary determination (66 FR 36743), the respondent made such a request on July 2, 2001. Therefore, entries of low enriched uranium made on or after January 9, 2002, and prior to the date of publication of this order in the **Federal Register**, are not liable for the assessment of antidumping duties due to the Department's discontinuation, effective January 9, 2002, of the suspension of liquidation.

In accordance with section 736 of the Act, the Department will direct U.S. Customs officers to reinstitute the suspension of liquidation for low enriched uranium from France effective the date of publication of this notice in the **Federal Register** and to assess, upon further advice by the Department pursuant to section 736(a)(1) of the Act, antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price or constructed export price of the merchandise for all relevant entries of low enriched uranium from France.

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On or after the date of publication of this notice in the **Federal Register**, U.S. Customs officers must require, at the same time as importers would normally deposit estimated duties on this merchandise, a cash deposit equal to the rates noted below. The All Others rate applies to all producers and exporters of low enriched uranium from France not specifically listed below. The cash deposit rates are as follows:

Exporter/manufacturer	Weighted-average margin percentage
Cogema/Eurodif	19.95
All Others	19.95

The all others rate applies to all entries of the subject merchandise except for entries from exporters/producers that are identified individually above.

This notice constitutes the antidumping duty order with respect to low enriched uranium from France, pursuant to section 736(a) of the Act. Interested parties may contact the Central Records Unit, Room B-099 of the main Commerce building, for copies of an updated list of antidumping duty orders currently in effect.

This order is issued and published in accordance with section 736(a) of the Act and 19 CFR 351.211.

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Dated: February 6, 2002.

Bernard T. Carreau,

Acting Assistant Secretary for Import Administration.

[FR Doc. 02-3538 Filed 2-12-02; 8:45 am]
BILLING CODE 3510-DS-P

APPENDIX F — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED MARCH 25, 2003

UNITED STATES COURT OF INTERNATIONAL TRADE

Court Nos. 02-00112, 02-00113, 02-00114, 02-00219, 02-00221, 02-00227, 02-00229, 02-00233

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

March 25, 2003, Decided

Before: POGUE, WALLACH, and EATON, Judges.

OPINION

Pogue, Judge: Plaintiffs Eurodif, S.A., COGEMA, COGEMA Inc. (collectively, "Cogema"), Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd. and Urenco, Inc. (collectively, "Urenco"), [1] challenge the final affirmative antidumping

1. Plaintiffs appear alternatively as Defendant-Intervenors in actions brought by USEC Inc. and the United States Enrichment Corporation challenging these final determinations. These actions have been consolidated as Court Numbers 02-

(Cont'd)

and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom. [2] Plaintiffs assert that the antidumping and countervailing duty laws do not apply to certain uranium enrichment transactions

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(Cont'd)

00221, 02-00227, 02-00229, and 02-00233, and the parties have submitted cross-motions for judgment on the agency record. The motions raise certain "general issues" which are addressed here. Pursuant to this Court's Scheduling Order of August 5, 2002, the parties have initially submitted opening briefs on these "general issues."

2. The challenged determinations are *Low Enriched Uranium from France*, 67 Fed. Reg. 6680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (final determination of sales at less than fair value) *("LEU from France")*; *Low Enriched Uranium from France*, 67 Fed. Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed. Reg. 6688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands and the United Kingdom*, 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

because the contractual arrangements involve purchases of enrichment services, rather than purchases of LEU as merchandise, and services fall outside the scope of the antidumping and countervailing duty laws. The Ad Hoc Utilities Group ("AHUG"), an association of twenty-two United States utilities that are consumers of low enriched uranium, seeks to intervene as of right in this action. *See* Mem. Supp. AHUG Mot. Intervene at 1 ("AHUG Intervention Mem."). This Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons discussed below, we find that Commerce's determinations are neither supported by substantial evidence in the record nor in accordance with law.

Background

On December 7, 2000, USEC, Inc. and its wholly-owned subsidiary United States Enrichment Corporation (collectively, "USEC"), petitioned the Department of Commerce for initiation of antidumping and countervailing duty investigations into imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. On December 21, 2001, Commerce issued its final affirmative determinations in the antidumping and countervailing duty investigations of LEU from France and in the countervailing duty investigations of LEU from Germany, the Netherlands, and the United Kingdom. *See LEU from France*, 66 Fed. Reg. at 65,877; *Low Enriched Uranium from France*, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final

affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

The antidumping and countervailing duty investigations initiated upon the petition of USEC covered "all low enriched uranium (LEU). LEU is enriched uranium hexafluoride (UF_6) with a U^{235} product assay of less than 20 percent that has not been converted into another chemical form, such as UO_2, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced." *LEU from France*, 66 Fed. Reg. at 65,877; *see also* Petition for the Imposition of Antidumping and Countervailing Duties on Low Enriched Uranium from France, Germany, the Netherlands and the United Kingdom, Jt. App. Tab 2-A at JA-1011-12 (stating the scope of the petition) ("Petition"). Low enriched uranium is a good, classifiable under headings 2844.20.0020, 2844.20.0030, 2844.20.0050, and 2844.40.00 of the Harmonized Tariff System of the United States ("HTSUS"). *See LEU from France*, 66 Fed. Reg. at 65,877; Petition, Jt. App. Tab 2-A at JA-1012-13. All parties to this action acknowledge that LEU itself is a good, and that trade in LEU may be subject to the application of the unfair trade laws. *See, e.g., LEU from France*, 66 Fed. Reg. at 65,878 ("{W}e found, and no party disputed, that LEU entering the United States constitutes a good, the tangible yield of a manufacturing

operation."); Pls.' Opening Br. Supp. Mot. J. Agency R. at 14 ("Pls.' Opening Br.").[3]

Low enriched uranium is used to produce nuclear fuel rods, which are used in nuclear reactors to produce electricity. *See LEU from France*, 66 Fed. Reg. at 65,879; Def.'s Resp. Opp'n Pls.' Mot. J. Agency R. at 5 ("Def.'s Resp."). Enrichment is the process by which the percentage of the fissionable isotope U^{235} contained in uranium is increased. *See, e.g.*, Pls.' Opening Br. at 9-10; Def.'s Resp. at 4. Natural uranium contains approximately 0.711 percent of U^{235}; most nuclear utilities in operation require fuel with a U^{235} concentration or "assay" between three and five percent. Pls.' Opening Br. at 9; Def.'s Resp. at 4-5.

The production of nuclear fuel involves: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium

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3. Title 19 U.S.C. § 1673 authorizes Commerce to impose antidumping duties where it "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673 (2000). The language of the statute requires that there be a sale or likely sale at less than fair value in order for there to be a final determination. *See* 19 U.S.C. § 1673d(a)(1) ("The administering authority shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value."). The Department interprets the statute to apply also to investigations of merchandise entered into the United States for "consumption." *LEU from France*, 66 Fed. Reg. at 65,878. We will assume, arguendo, that Commerce's interpretation is a reasonable one.

(U_{308}); (3) converting the natural uranium into uranium hexafluoride (UF_6), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. *See* Pls.' Opening Br. at 9; Def.'s Resp. at 3-5; *LEU from France*, 66 Fed. Reg. at 65,879. The process of enrichment results in the creation of LEU, with its higher concentration of U^{235}, and depleted uranium or uranium "tails." Pls.' Opening Br. at 10; *LEU from France*, 66 Fed. Reg. at 65,879.

Nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. *See LEU from France*, 66 Fed. Reg. at 65,878, 65,885; Pls.' Opening Br. at 13; Def.'s Resp. at 5. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of Dep't of Commerce Hearing (Oct. 31, 2001), Jt. App. Tab 6-A at 46 ("Hrg. Trans."); Pls.' Opening Br. at 13. All parties to this action agree that sales of enriched uranium product are sales of merchandise subject to the antidumping and countervailing duty laws. *See, e.g.*, Pls.' Opening Br. at 14 ("Movants do not question the application of the antidumping and countervailing duty laws to the sale of LEU.").

The second type of contract provides for the purchase of "separative work units" ("SWU") and also

provides for the delivery by the utility of a quantity of feed uranium to the enricher. *LEU from France*, 66 Fed. Reg. at 65,878, 65,884-85; Pls.' Opening Br. at 11-12; Def.'s Resp. at 5. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. *See LEU from France*, 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 10 & n. 15; Def.'s Resp. at 5. In an SWU contract, the precise quantity of LEU purchased is not initially specified. Rather, the contract specifies the general terms of the transaction. Notices given during the contract term specify the quantity of SWUs, the product assay, and the tails assay. These specifications determine the material characteristics of the resultant LEU. *LEU from France*, 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 11-12; Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 18 ("USEC Resp."). Specification of the product and tails assays by means of the notices given during the contract term permits the utility to determine how many SWUs it will pay for and how much feed uranium it will provide to the enricher. *See* Pls.' Opening Br. at 12 & n.20; USEC Resp. at 18; Hrg. Trans., Jt. App. Tab 6-A at 45-46. This allows the utility to "optimize the relative amounts of money and uranium it must provide for the LEU it will receive." USEC Resp. at 18; *see also id.* at 7 ("{T}he utility customer, by specifying the product assay and transactional tails assay . . . can control the total price it will pay and the amount of natural uranium it will provide."); Hrg. Trans., Jt. App. Tab 6-A at 45-46.

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Feed uranium is fungible. *See, e.g.*, USEC Resp. at 17. Therefore, the specific feed uranium provided by a utility customer need not be used to produce LEU for that customer. *See id.* at 16 & n.21. Rather, enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership. Any uranium held by the enricher may be used to produce LEU for any customer. *Id.* at 17; Def.'s Resp. at 5-6.

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. Title to feed uranium supplied to the enricher remains with the utility customer until the LEU is delivered, at which time title to the LEU is transferred to the utility. One contract states, for example, that "{t}itle to the Feed Material shall remain with {the utility} until the {LEU} Delivery associated with such Feed Material . . . at which time the Feed Material shall be deemed to have been enriched; whereupon {the utility} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1399. Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the

4. Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

enricher upon delivery of the feed uranium to the enricher. Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1399; Transcript of Oral Argument at 35 (Feb. 11, 2003) ("Oral Arg. Trans."). However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. *See, e.g.*, Oral Arg. Trans. at 34. Nor does the enricher have the power to sell a utility's feedstock to a third party. *Id.* at 35. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the enricher, the utility has title to and ownership of the LEU. *See* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1361 (indicating that title to the LEU and all risk of loss or damage to pass from the enricher to the utility customer upon delivery of the LEU by the enricher); *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-G at JA-1401. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5] *See, e.g.*, Oral Arg. Trans.

5. Commerce verified the foreign enrichers' records, which did not reflect payments for customer-provided uranium. Oral Arg. Trans. at 38. Furthermore, even though USEC has represented that, as an enricher, it receives feed uranium as consideration or "payment-in-kind" for the supply of LEU, USEC has required its utility customers to pay all property tax on what it views, correctly, as the "customer's feed." *See* Letter from Weil, Gotshal & Manges LLP to Hon. Norman Y. Mineta

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at 38. The contractual arrangement described above, in which utilities supply feed uranium and pay for the separative work performed as measured in SWUs, long predates the initiation of the challenged investigations. *See, e.g.*, Hrg. Trans., Jt. App. Tab 6-A at 43-45. During the 1960s and 1970s, the U.S. Department of Energy had a monopoly on enrichment services, but offered no other services relating to the production of nuclear fuel. *See id.* at 43. Consequently, utilities purchased enrichment services from the Department of Energy, but purchased feedstock from third parties. *Id.* at 43-45. In summary, utilities contract for each step of the nuclear fuel production process, including for enrichment. *Id.*

Commerce found during its investigations that enrichers were producers of LEU for purposes of the less-than-fair-value determination. In reaching its affirmative antidumping and countervailing duty determinations, Commerce concluded that EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed. Reg. at 65,884-85.

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(Dec. 20, 2000) at Ex. 2, Letter from USEC to Enrichment Customers (Nov. 19, 1998), Jt. App. Tab 5-B at JA-1885 ("USEC Property Tax Letter") ("USEC will report all the property that it owns at the two [gaseous diffusion plants] and will pay property tax accordingly. USEC does not intend to report any UF_6 to which it does not hold legal title."). The record does not indicate that the enrichers depreciated the customer-owned feed uranium or otherwise treated it as an asset.

The agency found that (1) the enrichment process is the "most significant manufacturing operation involved in the production of LEU" and that "it is the enricher who creates the essential character of LEU," *LEU from France*, 66 Fed. Reg. at 65,884; (2) the enrichers fully control the enrichment process, including the "level of usage of the natural uranium provided by the utility company," and therefore "cannot be considered tollers [or subcontractors] in the traditional sense under the regulation," *id.*; and (3) U.S. utility companies do not maintain production facilities for the enrichment of uranium. *Id.*

Plaintiffs argue that SWU contracts are transactions in services and therefore not subject to the antidumping and countervailing duty laws. *See, e.g.*, Pls.' Opening Br. at 7-9. Plaintiffs further assert that the petitions were not filed on behalf of the United States industry. *Id.* at 9. AHUG joins the plaintiffs in these assertions. *See* AHUG Intervention Mem. at 5-6; AHUG Opening Br. Supp. Mot. J. Agency R. at 7-8 ("AHUG Opening Br."). AHUG also claims that it is entitled to intervene as of right because its members are producers of LEU. AHUG Intervention Mem. at 5.

Standard of Review

This Court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Appendix F

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 95 L. Ed. 456, 71 S. Ct. 456 (1951) (internal citation omitted); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966). A decision will be reviewed on the grounds invoked by the agency, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196, 91 L. Ed. 1995, 67 S. Ct. 1575 (1947), and the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974). The Court's function is not to re-weigh the evidence, but to ascertain whether the agency's determination is supported by substantial evidence on the record. *Matsushita Elec. Indus. Corp. v. United States*, 750 F.2d 927, 936 (1984).

Appendix F

Discussion

I. The Tolling Regulation, 19 C.F.R. § 351.401(h), and Commerce's Prior Decisions Related Thereto[6]

Title 19 U.S.C. § 1673 provides that antidumping duties may be imposed on imported merchandise where "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value" and imports, sales, or likely sales of that merchandise result in injury or the threat of injury to the domestic industry, or in the material retardation of the establishment of the domestic industry. 19 U.S.C. § 1673.[7] In order to determine whether merchandise is

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6. Commerce argues that the issue of the applicability of the Department's tolling regulation is not a "general issue" and should therefore be postponed to a later stage in the proceeding. As we made clear in the Scheduling Order for this matter, issues which are not general include "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5. While the initial applicability of the tolling regulation also has implications for the Department's calculation results and methods, it is more appropriately addressed as a general issue affecting the Department's threshold determinations. Accordingly, we address it here.

7. The statute states that antidumping duties shall be imposed where

> (1) . . . a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, and

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being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represent the price of the good when sold in or for export to the United States.[8] *See* 19 U.S.C.

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(2) the Commission determines that —

(A) an industry in the United States —

(i) is materially injured, or

(ii) is threatened with material injury,

or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation.

19 U.S.C. § 1673. "The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets." *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995).

8. "Export price" is defined as

the price at which the subject merchandise is first sold (or agreed to be sold) before the date of

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§ 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In order to determine export price or constructed export price, Commerce must determine which company is the producer or exporter of the merchandise. *See Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT __, __, 143 F. Supp. 2d 958, 966 (2001) ("In order to make a less-than-fair-value determination, Commerce must first determine the exporter or producer of the subject merchandise who controls the export price (or constructed export price) that Commerce compares to normal values to determine dumping margins.").

In determining who is the producer or exporter of subject merchandise, one factor Commerce considers is whether the merchandise is manufactured under a tolling or subcontracting arrangement. Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a

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> importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

19 U.S.C. § 1677a(a). "Constructed export price" is defined as

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

19 U.S.C. § 1677a(b).

toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[9] 19 C.F.R. § 351.401(h). The regulation sets out "certain conditions under which {the agency} will not find that a toller or subcontractor is the producer of the subject merchandise." *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 32,810, 32,813, (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review). "{T}he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France*, 66 Fed. Reg. at 65,878. As observed by this Court, "Commerce's construction of 'producer,' as memorialized in {the regulation}, emphasizes three factors: (1) ownership of the subject merchandise; (2) control of the relevant sale . . .; and (3) control of production of the subject merchandise." *Taiwan Semiconductor Mfg. Co.*, 25 CIT at __, 143 F. Supp. 2d at 966. Thus, under the regulation, Commerce will not find tollers or subcontractors to be producers where such toller or subcontractor does not acquire ownership and does not control the relevant sale of the subject merchandise or foreign like product. The regulation "does not provide a basis to exclude

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9. "Relevant sale" is "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Taiwan Semiconductor, 143 F. Supp. 2d at 966* (quoting *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States* (Dep't Commerce June 30, 2000)).

merchandise from the scope of an investigation," *LEU from France*, 66 Fed. Reg. at 65,878, and "does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 32,813. In making its producer determination, Commerce is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented." *Id.*

Commerce has noted that "{t}ypically, the subcontracting, or tolling, addressed by this practice involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States*, Jt. App. Tab 7-A at JA-2604 (Dep't Commerce June 30, 2000) *("SRAMS Remand Response")*. The basis for treating the toller or subcontractor as a service provider and not the producer of the good is that the toller's price represents only the price for "some processing of the subject merchandise," not the "full cost of manufacturing." [10] *Polyvinyl Alcohol Mem.*, Jt. App. Tab

10. Commerce stated that

> Continuing to base the margin methodology on a toller's prices and/or costs for tolling only raises the issue as to whether such comparisons are consistent with the statute in determining the appropriate bases for normal value and export price, the definition of subject merchandise, and how we calculate dumping margins. The statute requires that

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7-F at JA-2730 (stating that Commerce prefers not to use tollers as respondents where a toller's price for the good does not "capture all the costs of production for producing the subject merchandise, as required by the statute"). Rather, the producer of the merchandise must be the company that "bears all essential costs from the inception of production through the time of the sale to the first customer. Because its pricing represents all elements of value, . . . this entity functions as the 'price setter' or potential price discriminator." *SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2604.

In *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8,909 (Dep't Commerce Feb. 23, 1998) (notice of final determination of sales at less than fair value) *("SRAMS from Taiwan")*, a foundry manufactured SRAM wafers using a design and design mask supplied by a design house. The design house developed the design, which was the crucial element in

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> we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise. Where cost of production and/or constructed value analysis is necessary, the statute requires that we calculate the full cost of manufacturing, not part of the cost of manufacture of the subject merchandise.

Dep't of Commerce Mem. from Team to Barbara R. Stafford, *Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun* Jt. App. Tab 7-F at JA-2730 (Aug. 8, 1995) *("Polyvinyl Alcohol Mem.")*.

the production of the SRAM wafer; retained ownership of the design as intellectual property; "arrange{d} and pa{id} for the production of" the design mask; and "{told} the foundry what and how much to make." *SRAMS from Taiwan*, 62 Fed. Reg. 51,442, 51,444 (notice of preliminary determination of sales at less than fair value). Commerce concluded that the foundry, TSMC, was a toller, or subcontractor, rather than the producer of the SRAMS. Pursuant to this Court's instruction to explain why it treated the foundry in *SRAMS from Taiwan* as a service provider and not the producer of the merchandise, Commerce stated that

> although a subcontractor may deliver to the contractor a product which, based on its characteristics, is subject merchandise, the price paid to the subcontractor may not represent the entire value of the subject merchandise, but merely represents a portion of that value. In fact, in most subcontracting arrangements, the contractor already owns an essential portion of the product, and thus the price paid is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed (and any inputs provided). Under these circumstances, we find that it is not appropriate to equate the price of a subcontractor's services (and material inputs) with the price of subject merchandise in a dumping analysis. Indeed, we do not consider the "sale" between the subcontractor and such

> a contractor to be a sale of subject merchandise at all. Rather, it is a sale of certain inputs and subcontracting services. It is the contractor's subsequent sale which is the relevant sale because that party owns the merchandise in its entirety and thus its sales price represents the full value of the subject merchandise.

SRAMS Remand Response, Jt. App. Tab 7-A at JA-2604. The agency noted that "the price from TSMC did not include an essential component of the product. Consequently, TSMC did not sell subject merchandise, but rather only sold inputs and fabrication services." *Id.* at JA-2605. The "essential component" not present in TSMC's pricing was the cost of the wafer design and design mask, which were provided to TSMC by the contractor. *Id.* at JA-2604-05.

Commerce further stated in the *SRAMS Remand Response* that

> we believe that the entity controlling the wafer design in effect controls production in the SRAMS industry. The design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask. At all stages of production, it retains ownership of the design and design mask. The design house then subcontracts the production of processed wafers with a foundry

> and provides the foundry with the design mask. It tells the foundry what and how much to make. The foundry agrees to dedicate a certain amount of its production capacity to the production of the processed wafers for the design house. The foundry has no right to sell those wafers to any party other than the design house unless the design house fails to pay for the wafers. Once the design house takes possession of the processed wafers, it arranges for the subsequent steps in the production process. The design of the processed wafer is not only an important part of the finished product, it is a substantial element of production and imparts the essential features of the product. The design defines the ultimate characteristics and performance of the subject merchandise and delineates the purposes for which it can be used.

SRAMS Remand Response, Jt. App. Tab 7-A at JA-2603. Commerce stated that it considered the foundry to be a subcontractor because "it did not acquire ownership of the SRAM design or the design mask, nor did it control the subsequent sale of the wafers." *Id.*

In *Polyvinyl Alcohol from Taiwan*, Commerce determined that under one contractual arrangement, the manufacturer of the subject merchandise, Chang Chun, was engaged as a toller or subcontractor, and therefore was not the producer of the subject merchandise for

purposes of calculating export or constructed export price. The contractor, DuPont, manufactured the primary input, shipped it to Taiwan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. *See Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2727. Commerce determined that under these circumstances, DuPont was the producer of the subject merchandise. *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 6,527. Like the design house in *SRAMS from Taiwan*, DuPont (1) coordinated all aspects of the production of the good and (2) supplied materials to the subcontractor to be used in the manufacturing process.[11] *See Polyvinyl Alcohol from*

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11. Notably, in a second contractual setting in *Polyvinyl Alcohol from Taiwan*, Commerce determined that the same manufacturer, Chang Chun, was the producer of the subject merchandise, while the other company, Perry, was determined to be an importer and reseller. *See Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 6,527. The contractual arrangement under which Perry purchased and supplied input materials to Chang Chun was altered only after a finding of sales at less-than-fair-value by Chang Chun. *Id.* Perry purchased the inputs from a Chang Chun affiliate and arranged for their delivery to Chang Chun. *Id.* Perry did not and had never manufactured any chemicals or chemical inputs; it was merely an importer and reseller. *Id.* The crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to

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Taiwan, 63 Fed. Reg. at 6,527 (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. at 32,817 (final results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2727.

Finally, in *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. 68,853 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value), Commerce determined that Akai, a contractor that did not engage in manufacturing operations, was the producer of the subject merchandised. *Id.* at 68,855. Akai "purchase{d} and maintaine{d} title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges," and also "direct{ed} and control{led} the manufacturing process" by providing specifications for the finished merchandise. 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced . . . Akai controls the costs for all elements incorporated in the production of the flanges." *Id.*

The circumstances of the instant case largely resemble the tolling or subcontracting arrangements

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circumvent the antidumping duties. This is distinguishable from the instant case because here the utility purchases the feedstock from a party unrelated to the enricher, and therefore the purchase of the feedstock confers no economic benefit on the enricher. The contract here is not simply a restructured purchase contract.

seen in these earlier determinations. Like Akai in *Certain Forged Stainless Steel Flanges from India*, the utilities direct and control the process of producing the merchandise, i.e. nuclear fuel. *See, e.g.*, Hrg. Trans., Jt. App. Tab 6-A at 44-45. Using contractors at each step, they coordinate the production of uranium, LEU, and fuel rods. *Id.* As in *Polyvinyl Alcohol from Taiwan*, where the contracting company provided the material to be processed, the utilities provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of UF_6 and can make the decision as to how much UF_6 versus how many SWUs to purchase in a given transaction. *See* Pls.' Opening Br. at 13 n.22 & sources cited therein. The contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. *See, e.g.*, French CVD Verification Exhibit C-1 (Oct. 23, 2001), [ ], Jt. App. Tab 4-A at JA-1507. As noted above, the utility customer retains title to the feed uranium until it is enriched. *See, e.g.*, Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1364; USEC Property Tax Letter, Jt. App. Tab 5-B at JA-1885-86 (noting that the utility customer is responsible for paying property taxes due on feed uranium stored by USEC on the utility's behalf). Upon enrichment and delivery of LEU, the title to the feed is considered extinguished and the customer gains title to the LEU. Significantly, the contracts for LEU state that once the separative work is performed and the LEU is delivered, "the Feed Material shall be

deemed to have been enriched; whereupon {the utility customer} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Uranium Enrichment Services Contract between [] and Urenco, Jt. App. Tab 3-F at JA-1364; *see also* Uranium Enrichment Services Contract between [] and Urenco, Jt. App. Tab 3-G at JA-1399.[12] These contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer. The SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. Accordingly, the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind. *See LEU from France*, 66 Fed. Reg. at 65,884-85 (indicating that while Commerce recognized that the provision of feed uranium under SWU contracts "may not be a payment-in-kind in the formal sense," it is substantively a payment in kind and is part of an "arrangement between buyer and seller . . . dedicated to the delivery of LEU").

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12. Defendant United States cites *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997), for the proposition that a sale exists when there is "a transfer of ownership to an unrelated party and consideration." *NSK Ltd.*, 115 F.3d at 975; Def.'s Resp. at 58-59. As there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable.

Appendix F

The designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India*. The designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U^{235} needed by that reactor,[13] and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *See, e.g.*, AHUG Intervention Mem. at 11. The utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays.

Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise. In *SRAMS from Taiwan*, discussed *supra*, the design house subcontracted the manufacturing of the wafer to a foundry. The design house created the design, retained ownership of the design throughout the production process, and provided manufacturing

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13. AHUG states that "{t}he specific level of U^{235} needed is determined by each utility, based on the reactor core design it develops for its own reactors. In developing this design, the utility determines the number of fresh fuel assemblies and corresponding enrichment level necessary to produce the energy it needs until the next scheduled refueling date." AHUG Intervention Mem. at 11.

specifications to the foundry. *SRAMS from Taiwan*, 63 Fed. Reg. at 8,918 ("The design house . . . subcontracts the production of processed wafers with a foundry and provides the foundry with the design mask. It tells the foundry what and how much to make.") (quoting internal decision memorandum); *see also* text pp. 18-20, *supra*. Commerce found that the design house was the producer of the wafers. *Id.* at 8,918-19.

In *Certain Forged Stainless Steel Flanges from India*, the petitioners claimed that Akai, a company that did not engage in manufacturing operations, could not be the producer of the subject merchandise. 58 Fed. Reg. at 68,855. Commerce disagreed, stating that Akai was the producer of the subject merchandise because in addition to purchasing and retaining title to the raw materials used to produce the "vast majority" of the flanges, Akai also "direct{ed} and control{led} the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced." 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced . . . Akai controls the costs for all elements incorporated in the production of the flanges." *Id.* Similarly, in *Certain Pasta from Italy*, 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review), Commerce determined that the producer was a company that purchased all inputs, paid the subcontractor a processing fee, and maintained ownership of both the inputs and the final product at all times, as well as marketed the product and conducted product testing and marketing research.

Accordingly, if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decisions were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU. Here, however, Commerce determined that the enrichers were the producers, offering three primary reasons for distinguishing this case from its prior decisions in cases involving tolling services. First, the agency asserted that "the enrichment process is such a significant operation that it establishes the fundamental character of LEU." *LEU from France*, 66 Fed. Reg. at 65,884. Yet in earlier cases involving tolling, it has also been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into the subject merchandise. In *Polyvinyl Alcohol from Taiwan*, the subcontractor Chang Chun transformed the material provided by DuPont into the final good, polyvinyl alcohol. See 63 Fed. Reg. at 6,527 ("DuPont . . . produces the main input, vinyl acetate monomer ('VAM'), which it then ships to Taiwan. Under contract with Chang Chun, the VAM is then converted into subject merchandise."). In *Certain Pasta from Italy*, the toller manufactured the subject pasta from the inputs supplied by the producer. *See* 63 Fed. Reg. at 53,642 ("Corex reports that it: (1) purchases all of the inputs, (2) pays the subcontractor a processing fee, and (3) maintains ownership at all times of the inputs as well as the final product."). Here, the enricher transforms feed uranium into LEU. Yet, as in the earlier cases, while its operations do create the "essential character" of LEU, the enricher does not acquire

ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU.

Second, Commerce distinguished the instant case from prior cases on the ground that "the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation." [14] *LEU from France*, 66 Fed. Reg. at 65,884. However, tollers normally, and in prior cases, control the operational process by which they perform the tolling services. Like the contractor Akai in *Certain Forged Stainless Steel Flanges from India*, the utility controls the specifications of the final product. *See* 58 Fed. Reg. at 68,856 ("{W}e have determined that Akai is the producer of this merchandise. . . . Akai purchases and maintains title . . . to the raw materials used for the production of the vast majority of the flanges, and . . .

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14. Commerce based this distinction in part on its conclusion that "the most important factor in determining whether the contract is fulfilled is whether the utilities receive the precise amount of LEU that results from the application of the SWU equation that is explicitly spelled out and agreed upon in the SWU contract." *LEU from France*, 66 Fed. Reg. at 65,884. In fact, the substantive provisions of the contracts are fulfilled by the purchase of the designated quantities of SWU, the enrichment of the uranium to the specified assay, and delivery of the LEU. *See, e.g.*, Contract for Uranium Conversion and Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3-C at JA-1255-58; Contract for Uranium Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3-E at JA-1297, JA-1299, JA-1301, JA-1303-05; Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at JA-1356.

directs and controls the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced."). As in *Certain Forged Stainless Steel Flanges from India*, the actual processes of creating the product are left within the control of the toller. *See id.*

Third, Commerce stated that "utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *LEU from France*, 66 Fed. Reg. at 65,884. Yet under the circumstances of this case, the fact that the utilities do not maintain enrichment facilities does not appear to be significant. Commerce itself acknowledged the expense and technological sophistication involved in building and maintaining enrichment facilities. *See id.* (noting that each of the two technologies for enriching uranium feedstock, gaseous diffusion and centrifuge, "requires a huge financial investment in facilities and a technically skilled workforce. In fact, the centrifuge technology has been years in the making and has required millions of dollars in research. So highly specialized is it, and so expensive to develop, that three major European governments combined their resources to develop the technology and create Urenco."). Moreover, we note that the producers in *SRAMS from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India* did not maintain manufacturing facilities, and this fact did not prohibit the application of the tolling regulation. *See SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2603; *Certain Pasta from Italy*, 63 Fed. Reg. at 53,642; *Certain Forged Stainless Steel Flanges from India*, 58 Fed. Reg. at 68,855. Finally, while the enricher

invests in the research and development necessary to develop and maintain separation facilities, we note that the foundry in *SRAMS from Taiwan* "conduct{ed} research and development related to process technology," but that this fact was not "controlling to {Commerce's} analysis." *SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2606 n.3.

Commerce asserted in its final determination that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed. Reg. at 65,884. However, under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Yet Commerce has previously distinguished toll-produced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *See, e.g., SRAMS Remand Response*, Jt. App. Tab 7-A at JA-2603-04.

We cannot reconcile Commerce's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are "functionally equivalent," and that "{i}t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United

States." *LEU from France*, 66 Fed. Reg. at 65,879, 65,885. Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased.

Under EUP contracts, enrichers purchase their own uranium feed and enrich it for sale to the utilities as a complete product. Utilities pay the seller a price that reflects all elements of the value of the LEU: the value of the natural uranium and the amount of enrichment services, or SWU, performed.

Under SWU contracts, by contrast, the purchase price does not include the full value of the merchandise involved. Most significantly, such contracts do not include the cost or responsibility for providing the uranium feed, and no payment for the uranium is recognized on the enricher's financial statements, as would be the case if the enricher merely bought the uranium.[15] These types of transactions thus do not contemplate the sale of a complete product. Instead, enrichment contracts specify that the only payment to be made by the utility is for the enrichment services to be provided, on a price-per-

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15. The apparent reason for this structure is to allow a utility to control costs by determining how much feedstock it supplies, versus how many SWUs it pays for. *See, e.g.*, Pls.' Opening Br. at 10-12; AHUG Opening Br. at 11-12; Oral Arg. Trans. at 50, 57-58. No benefit flows to the enricher from the utility's supplying the feedstock.

SWU basis.[16] While the SWU prices may include certain incidental costs, they do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *See* Petition, Jt. App. Tab 2-A at JA-1016. Commerce has recognized that where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law. [17] Commerce's decision in the *SRAMS Remand Response* confirms this position. The statute requires a comparison of "the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." *Polyvinyl Alcohol Mem.*, Jt. App. Tab 7-F at JA-2730.

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16. For example, the Uranium Enrichment Services Contract between [ ] and Urenco specifies as follows: [ ] Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3-F at 1366. Further, the [ ] under a Cogema enrichment contract provides as follows: 12.3 [ ] Uranium Enrichment Services Contract between [ ] and Cogema, Inc., Jt. App. Tab 3-E at JA-1308.

17. The record does not indicate that Commerce analyzed the pricing provisions of the SWU contracts, or the structure of SWU transactions, in order to distinguish them from the pricing or transactional patterns found in the earlier cases involving subcontracting or tolling arrangements and in which 19 C.F.R. § 351.401(h) was found to apply.

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While Commerce correctly states that 19 C.F.R. § 351.401(h) does not "exempt merchandise from {antidumping} proceedings," *LEU from France*, 66 Fed. Reg. at 65,880, the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins.

It is well established that Commerce is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. *Allegheny Ludlum Corp. v. United States*, 24 CIT __, __, 112 F. Supp. 2d 1141, 1147 (2000) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)); *see also Asociacion Colombiana de Exportadores v. United States*, 22 CIT 173, 184-85, 6 F. Supp. 2d 865, 879-80 (1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence."). Here, Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases, including *SRAMS from Taiwan* and *Polyvinyl Alcohol from Taiwan*, represents a departure from the practice authorized by a regulation "having the force and effect of law." *Allied Signal*

Aerospace Co. v. United States, 28 F.3d 1188, 1191 (Fed. Cir. 1994). As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations.

In summary, Commerce's determination that enrichers are producers and not tollers is against the weight of the evidence on the record and inconsistent with both the agency's regulations and its prior decisions involving tolling services. Commerce's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, are not persuasive. Thus, Commerce's decision to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law.

II. Industry Support

In determining that the antidumping and countervailing duty petitions regarding low enriched uranium had the requisite industry support, Commerce determined that enrichers, but not utilities, were producers of the subject merchandise.[18] *See Low*

18. 19 U.S.C. § 1673a(b)(1) provides that

> an antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the

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> imposition of the duty imposed by section 1673 of this title. . . .

19 U.S.C. § 1673a(b)(1).

19 U.S.C. § 1677(9) defines "interested party" as:

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,
>
> . . . .
>
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
>
> . . . .
>
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product. . . .

19 U.S.C. § 1677(9).

In order to determine that a petition has the requisite industry support, Commerce must find that

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and

(Cont'd)

Appendix F

Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 1,080, 1,081 (Dep't Commerce Jan. 5, 2001) (notice of initiation of antidumping duty investigations) ("Antidumping Initiation Notice"). Consequently, Commerce determined that petitioner USEC, as the sole domestic producer of LEU, "established industry support representing over 50 percent of total production of the domestic like product," and therefore the industry support requirement was fulfilled. *Id.*

Commerce employed a six-factor test used by the International Trade Commission to determine whether a company may be considered a "member of the domestic industry." Dep't Commerce Mem. from Melissa G. Skinner to Holly A. Kuga, *Determination of Industry Support for the Antidumping and Countervailing Duty Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom*, Jt. App. Tab 1-A at JA-0007-08 (Dec. 27, 2000) *("LEU Industry Support Mem.")*. The test "focuses upon 'the overall nature' of production-related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id.* at JA-0008.

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> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A).

Commerce determined that the utilities were not producers of LEU because

> {t}hese companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing.

Id. (citing *Brother Industries, Ltd. v. United States*, 16 CIT 1106 (1992) *aff'd*, 1 F.3d 1253, 1993 WL 283597 (Fed. Cir. 1993)). Rather, Commerce determined that the utility companies are "purchasers and industrial users of LEU." *Id.*

Commerce further asserted that the tolling regulation, 19 C.F.R. § 351.401(h), does not apply to determine who is a producer for the purposes of industry support. *See LEU Industry Support Mem.*, Jt. App. Tab 1-A at JA-0006. Commerce stated that

> we do not interpret section 351.401(h) . . . to be applicable to our determinations on industry support. Instead, . . . we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price, and normal value," and not for purposes of

> determining industry support.... Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

Id. (internal footnotes omitted).

Commerce further noted that

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold to the United States.... By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for purposes of industry support are separate questions that require different examinations for different purposes.

Id. at JA-0007.

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Commerce's decision not to apply the tolling regulation to determine who is a producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation. The Court acknowledges that the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination. However, it is unclear from Commerce's explanation why the definition of "producer, " a term that is not statutorily defined, should differ between one subsection of the statute and another. Furthermore, it appears incongruous that Commerce may determine that the utility companies are not producers of LEU for the purpose of the industry support determination, but subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price.[19] Where a term appears in

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19. When making an industry support determination, Commerce identifies the producers that make up the domestic industry. 19 U.S.C. § 1673a(c)(4); 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."). When Commerce identifies the producer of subject merchandise for the purpose of determining export price or constructed export price and calculating the dumping margin, the agency is identifying a seller in the ordinary course of trade. *See* 19 U.S.C. § 1677b. Although we do not reach this issue, it would seem that if the word "producer" were to have a different definition in the context of

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multiple subsections within a statute, we "presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently." *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001). Commerce is permitted to apply different definitions of such a statutory term only if it provides "an explanation sufficient to rebut this presumption." *Id.*

Consequently, as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be "producers" under the tolling regulation are also "producers" for purposes of the industry support determination. Should Commerce determine that this is not the case, and that, in effect, a different definition of "producer" applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

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the industry support determination than in the context of the export price determination, the industry support definition should be the more inclusive, not the more exclusive, because the purpose of the provision is to identify the industry as a whole.

Appendix F

III. Applicability of the Countervailing Duty Statute

In deciding to apply the countervailing duty law to the subsidies it found to have benefitted Plaintiffs during the period of investigation, Commerce, relying on the same rationale it employed in applying the antidumping duty law, determined that because LEU was entering the United States for consumption, that merchandise was subject to countervailing duties:

> Similarly, in conducting countervailing duty investigations, {19 U.S.C. § 1671(a)(1)} requires the Department to impose duties if, *inter alia*, "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

LEU from France, 66 Fed. Reg. at 65,879. Commerce went on to note that "under the countervailing duty law, {19 U.S.C. § 1677(5)(E)(iv)} defines as a benefit the purchase of goods for more than adequate remuneration. Because we have determined that SWU contracts involve the purchase of LEU, we determine that these

transactions constitute the purchase of goods." *Id.* at 65,883 n.7; *see also* 19 U.S.C. § 1677 (5)(E)(iv).

We have already determined that Commerce's determination regarding the "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU. Upon remand, the Department will have the opportunity to reconsider the application of its tolling regulations to the transactions at issue here. The Department therefore must reconsider its countervailing duty determinations in that context.

IV. Intervention of the Ad Hoc Utilities Group

Intervention in antidumping and countervailing duty actions "is governed by Rule 24 of the Rules of this Court subject to the limitations in 28 U.S.C. § 2631(j)."[20] *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365, 738 F. Supp. 541, 542 (1990) (citing *Manuli Autoadesivi, S.p.A. v. United States*, 9 CIT 24, 25, 602 F. Supp. 96, 97-98 (1985)). Title 28 U.S.C. § 2631(j)(1) provides that "{a}ny person who would be adversely affected or

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20. USCIT Rule 24 provides, inter alia, that a party may intervene as of right in an action when it "claims an interest relating to the property or transaction which is the subject of the action and . . . the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." USCIT R. 24(a).

aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action." However, subsequent subparagraphs limit this right. Title 28 U.S.C. § 2631(j)(1)(B) provides that, "in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." Additionally, under section 2631, "'interested party' has the meaning given such term in section 771(9) of the Tariff Act of 1930." 28 U.S.C. § 2631(k)(1). That section defines "interested party" as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E).

Intervention in an action before this Court implicates the Court's jurisdiction and authority. Consequently, it is the Court that determines who is an "interested party" for the purpose of intervention. As noted in *Zenith Radio Corp. v. United States*, "{t}here is no presumption of standing in an area where Congress has provided explicit instructions on the subject." 5 CIT 155, 156 (1983) (internal citation omitted). Furthermore, as the Court observed, Commerce's decision to permit a party to participate in its investigative process, "even if done in terms of recognizing them as 'interested parties,' cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Id.* "The agenc{y's} receptiveness to participation by various parties does not generate

standing for judicial review." *Id.* (internal citation omitted). This Court's decision as to whether AHUG's members are "interested parties" for purposes of intervention in the instant action does not depend upon the administrative determination as to the same question.[21]

AHUG participated in the administrative proceedings at issue here pursuant to 19 C.F.R. § 351.312, which permits "industrial users" of subject merchandise to submit "relevant factual information and written argument" to

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21. The government directs the Court's attention to *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 738 F. Supp. 541 (1990) in support of the proposition that this Court "is divided with respect to the question whether the agencies or the Court determines who is an 'interested party who was a party to the proceeding.'" Def.'s Resp. Opp'n AHUG Mot. Intervene at 11. In *Rhone Poulenc*, the Court determined whether a party was "an interested party who was a party to the proceeding," as required by 28 U.S.C. § 2631(j)(1)(B), by referring to Commerce's regulations governing who was a "party to the proceeding." *Rhone Poulenc*, 14 CIT at 365, 738 F. Supp. at 542. In Zenith Radio Corp., the Court denied a motion for intervention after determining that the applicants did not meet the statutory and regulatory definitions of interested parties. 5 CIT at 157. The applicants claimed that because the administrative agency had accepted their participation in its proceeding, they had standing to intervene in the action before the Court. The Court's decision in *Zenith* clarifies that, while the Court will look to the relevant statutes and regulations in determining who is eligible to bring or intervene in an action, the actions of the agency cannot bind the Court in connection with its determination of standing and the exercise of its jurisdiction. Consequently, there is no conflict between the Court's decisions in *Rhone Poulenc* and in *Zenith Radio Corp.*

Commerce. 19 C.F.R. § 351.312(b).[22] However, no provision of the statutes or regulations indicates that participation in the administrative proceeding as an "industrial user" is sufficient to meet the requirement of "party" to the proceeding under 28 U.S.C. § 2631.

Furthermore, we note that even if AHUG is considered to have been a "party" to the administrative proceeding

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22. Section 351.312 permits industrial users to "submit relevant factual information and written argument" under §§ 351.218(d)(3)(ii), (d)(3)(vi), and (d)(4), addressing sunset reviews; §§ 351.301(b), (c)(1), and (c)(3), addressing time limits; §§ 351.309(c) and (d), which permit "any *interested party* or U.S. Government agency" (emphasis supplied) to submit written argument in antidumping and countervailing duty proceedings; and § 351.309(e), which permits comments in connection with expedited sunset reviews. 19 C.F.R. § 351.312(b). The most pertinent section here is § 351.309, but it appears from the language of the regulation that AHUG would have to be an "interested party" within the meaning of the antidumping and countervailing duty statutes in order to make a submission. However, it is unclear why § 351.312 would grant the right to participate to "industrial users," who presumably are not "interested parties," and yet cross-reference another subsection requiring interested party status.

As USEC points out in its brief, USEC did not object to AHUG's participation in the administrative proceeding as an industrial user. *See* Resp. Br. of USEC Opp'n AHUG Mot. Intervene at 5. Additionally, the briefs submitted by both USEC and the Department of Justice in connection with AHUG's motion to intervene appear to assume that AHUG properly appeared in the administrative proceeding below. As the regulation is unclear, the Court will assume that AHUG properly participated in the administrative proceeding under 19 C.F.R. § 351.312.

within the meaning of 28 U.S.C. § 2631(j)(1)(B), the association still must meet the definition of "interested party," as required by 28 U.S.C. §§ 2631(j)(1)(B), 2631(k)(1). As noted earlier, "interested party" in this context is defined as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E); *see also* 28 U.S.C. § 2631(k)(1).

Although Commerce acknowledged that the utility companies were "purchasers and industrial users of LEU," the agency determined they were not producers of LEU for purposes of industry support. *LEU Industry Support Mem.*, Jt. App. Tab 1-A at JA-0008. Yet as we are remanding to Commerce the question of the applicability of the tolling regulation, the question whether AHUG's members are "producers" of LEU within the meaning of the statute remains unresolved. Moreover, as discussed earlier in this opinion, application of the tolling regulation would result in a finding that the utilities are producers of LEU. *See supra* text at 26-35; 19 C.F.R. § 351.401(h). Accordingly, AHUG's members may be "producers" within the meaning of 19 U.S.C. § 1677(9)and 28 U.S.C. § 2631(k)(1).

Significantly, AHUG members, as purchasers and users of LEU, could be adversely affected by a decision in the instant case. 28 U.S.C. § 2631(j). The association has actively participated, to the extent permitted, throughout the administrative investigation, and the

views and concerns of AHUG's members may offer valuable insights in this litigation. Finally, AHUG's claims raise questions of law and fact common to those raised by the plaintiffs, who are mandatory parties here.

As noted above, a decision by Commerce regarding a party's status for purposes of participation in the agency's investigative process "cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Zenith Radio Corp.*, 5 CIT at 156. Under the facts presented in this case, because AHUG's members may be "producers" of LEU within the meaning of 19 U.S.C. § 1677(9) and 28 U.S.C. § 2631(k)(1), and therefore entitled to intervene as of right, we will grant AHUG's motion to intervene as an "interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(j)(1)(B).

Conclusion

In summary, we find that Commerce's decision not to apply the tolling regulation to the SWU contracts between enrichers and utilities, as well as its industry support determination, were neither supported by substantial evidence nor in accordance with law. The Court remands these matters to Commerce for further proceedings consistent with this opinion. Remand results are due seventy-five days from the date of this decision. All parties may file responses thereto within twenty days

after the filing thereof. All parties may reply to any responses within seven days after the filing thereof. Finally, AHUG's motion to intervene in the instant action is granted.

APPENDIX G — FINAL REMAND DETERMINATION BY THE DEPARTMENT OF COMMERCE DATED JUNE 23, 2003

Public Version

FINAL
REMAND DETERMINATION
USEC Inc. and United States Enrichment Corporation v. United States
Court Nos. 02-00112, 02-00113, 02-00114 and
Consol. Court Nos. 02-00219, 02-0000221,
02-00227, 02-00229, and 02-00233
Slip Op. 03-34, (March 25, 2003)

SUMMARY

This remand determination, submitted in accordance with the order of the U.S. Court of International Trade on March 25, 2003 (Slip Op. 03-34), involves challenges to the initiations and final affirmative determinations by the U.S. Department of Commerce (the Department) in the antidumping and countervailing duty investigations on low enriched uranium from France, Germany, the United Kingdom, and the Netherlands. *Notice of Initiation of Antidumping Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1080 (Jan. 5, 2001); *Notice of Initiation of Countervailing Duty Investigations: Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 66 FR 1085 (Jan. 5, 2001); *Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France*, 66 FR 65877 (Dec. 21, 2001) *("Final French AD Determination"); Notice of Final*

Appendix G

Affirmative Countervailing Duty Determination: Low Enriched Uranium From France, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

The challenges pertain to the Department's interpretation and application of its "tolling or subcontractor" regulation, 19 C.F.R. § 351.401(h), for purposes of determining industry support; for selecting the exporters or producers for purposes of establishing export and/or constructed export price, and normal value; and for purposes of determining whether the government of France has purchased goods, as compared to services, for more than adequate remuneration.

BACKGROUND

On December 21, 2001, the Department published notices of final affirmative determinations in the antidumping duty investigation on low enriched uranium from France, and in the countervailing duty investigations on low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. *Final French AD Determination*, 66 FR 65877 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determination: Low Enriched Uranium From France*, 66 FR 65901 (Dec. 21, 2001); and *Notice of Final Affirmative Countervailing Duty Determinations: Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 FR 65903 (Dec. 21, 2001).

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On March 25, 2003, the U.S. Court of International Trade (the Court) issued an opinion in the above cases, remanding the above issues to the Department for further explanation and consideration of its determinations. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003). The Court's opinion on each of the issues is summarized in the particular sections of this redetermination.

On June 6, 2003, the Department issued a draft remand redetermination in the above cases. Comments pertaining to the Department's draft redetermination were filed on June 13, 2003, by Urenco and Eurodif in a combined submission; USEC; PACE, on behalf of the domestic workers; and the Ad Hoc Utilities Group (AHUG) on behalf of U.S. utility companies.

A. INDUSTRY SUPPORT

a. *The Department's Decision to Initiate the AD and CVD Investigations on LEU*

In making its decision to initiate the investigations on low enriched uranium, the Department was required to determine whether the petitions were "filed by or on behalf of the industry." [1] To do so, the statute directs the Department to determine whether there is sufficient support for the petition by "the domestic producers or

1. Under the countervailing duty law, section 702(c)(4) of the Tariff Act of 1930 ("the Act"); and for the antidumping duty law, section 732(c)(4) of the Act.

workers" who are eligible to file a petition. To determine whether a company qualifies as a "domestic producer," the Department "examines production operations to determine whether a company qualifies as a producer of the domestic like product." *Determination of Industry Support for the Antidumping and Countervailing Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom* (Dec. 27, 2000) ("*LEU Industry Support Mem.*"), at 8. The Department stated that "[a]t a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *Id.* at 7. To determine whether a company may be a member of the domestic industry, the Department adopted the same test the U.S. International Trade Commission (ITC) employs to determine the appropriate domestic industry for purposes of its injury investigation, analysis and determination. To make its determination, the ITC examines a company's "production related activities in the United States." The Department noted that the ITC's six-factor test "focuses upon the 'overall nature' of the production related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id.* at 8. *See, e.g., Certain Cut-to-Length Steel Plate from France, India, Indonesia, Italy, Japan, and Korea*, Inv. Nos. 701-TA-387-391 and 731-TA-816-821 (Final), USITC Pub. 3273 at 8-9 (Jan. 2000). The Department stated that "[t]he Commission typically considers six factors: (1) the extent and source of a firm's capital investment; (2) the technical expertise

involved in U.S. production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and (6) any other costs and activities in the United States leading to production of the like product." *LEU Industry Support Mem.*, at 8.

In applying the test, the Department found USEC to be the sole producer of the domestic like product based upon its analysis of USEC's manufacturing operations. *Id.* at 5. The Department found that "USEC performs all of the processes necessary for enriching converted uranium." *Id.* at 8. The Department concluded that:

> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing operation in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States.

Id. at 5.

In reaching this conclusion, the Department also determined that the agency's regulation on the treatment of subcontractors and "tolling," 19 C.F.R. § 351.401(h), was not applicable for purposes of making

industry support determinations.[2] The Department reasoned as follows:

> First, we do not interpret section 351.401(h) of the Department's regulations (*i.e.*, the "tolling regulation") to be applicable to our determinations on industry support. Instead, consistent with the language of the regulation, we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed

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2. **SUBPART D - CALCULATION OF EXPORT PRICE, CONSTRUCTED EXPORT PRICE, FAIR VALUE AND NORMAL VALUE**

§ 351.401 In General

(a) *Introduction.* In general terms, an antidumping analysis involves a comparison of export price or constructed export price in the United States with normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price and normal value. (*See* section 772, section 773, and section 773A of the Act.)

* * *

(h) *Treatment of subcontractors ("tolling" operations).* The Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product.

19 C.F.R. § 351.401 (2000).

> export price and normal value," and not for purposes of determining industry support. Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

The Department also examined the purpose of the provisions in which the term "producer" appeared, and set forth its rationale for not applying the tolling regulation in its industry support analysis, stating as follows:

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold in the United States. Under section 351.401(h), therefore, the Department focuses on which party controls the relevant sale of the subject merchandise or foreign like product. By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for

> purposes of industry support are separate questions that require different examinations for different purposes.

Id. at 7.

b. *The Court's Remand on the Department's Industry Support Determination*

The Court has now remanded this issue to the Department for further examination and explanation, as appropriate. *USEC Inc. and United States Enrichment Corp. v. United States*, Slip Op. 03-34, (Mar. 25, 2003) (*USEC*). In its remand decision, the Court stated that "Commerce's decision not to apply the tolling regulation to determine who is the producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation." *USEC*, at 38. The Court acknowledged that "the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination." *Id.* The Court noted, however, that "it is unclear from Commerce's explanation why the definition of 'producer,' a term that is not statutorily defined, should differ between one subsection of the statute and another." *Id.*

In addition, the Court noted the potential incongruity that "Commerce may determine that the utility companies are not producers of LEU for the purpose of the industry support determination, but

subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price." *Id.* at 39. Citing the principle enumerated in *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) (*SKF USA*), the Court stated that "[w]here a term appears in multiple subsections within a statute, we 'presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.'" *Id.* at 39, quoting *SKF USA* at 1382. The Court stated that "Commerce is permitted to apply different definitions of such a statutory term only if it provides 'an explanation sufficient to rebut this presumption.'" *Id.*, quoting *SKF USA* at 1382. The Court then stated that:

> as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination. Should Commerce determine that this is not the case, and that,

> in effect, a different definition of 'producer' applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

Id. at 40.

c. *Analysis and Discussion of the Industry Support Determination*

In accordance with the Court's direction, the Department has reconsidered its interpretation of its tolling regulation in the industry support context. In this case, we note that in the original LEU investigations the Department uniformly determined uranium enrichers to be the producers of LEU, both for purposes of industry support and for establishing U.S. price and normal value (NV). Because the Court has recognized the potential for reaching incongruous results (*i.e*, finding enrichers to be domestic producers for purposes of industry support, while finding that utility companies may, under the tolling regulation, be considered foreign producers for purposes of establishing U.S. price and NV), the Department will explain its analysis further with respect to the different definitions of the term "producer" used in these contexts. Based upon our examination and interpretation of the statutory provisions governing industry support and U.S. price and NV, together with the relevant legislative history, we find that different legislative purposes behind these statutory provisions warrant the use of different

definitions of the term "producer" in order to fulfill the intent of Congress, as we will explain.

1. The Statutory Definitions

In determining whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties; and section 732(c)(4) of the Act for antidumping duties.[3] Section 771(4)(A) of the Act defines the industry as "the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."[4] Thus, to determine whether there is adequate industry support for a petition, the Department must first identify the domestic like product. Once the product is identified, the agency examines the industry's production for purposes of determining whether the petition is filed by or on behalf of the industry. Specifically, section 732(c)(4) of the Act states that "the administering authority shall determine that the petition has been filed by or on behalf of the industry," if two conditions are established:

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3. 19 U.S.C. §§ 1671 and 1673a(c)(4)(A). For convenience, hereinafter we will refer to the statutory provisions under the antidumping law. Parallel provisions, however, in the countervailing duty law also apply.

4. 19 U.S.C. § 1677(4)(A).

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
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> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by the portion of the industry expressing support for or opposition to the petition.

19 U.S.C. §1673a(c)(4)(A). The statute also defines the term "domestic producers or workers" for purposes of industry support determination, stating that "[f]or purposes of this subsection, the term 'domestic producers or workers' means those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[5] In turn, subsection (b)(1) states that an antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition . . ." .[6] The statute enumerates those parties that may file a petition, specifically listing "a manufacturer, producer, or wholesaler in the United States of a domestic like product" under subsection (C), and "a certified union or recognized union or group of workers which is representative of an industry engaged in the

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5. 19 U.S.C. § 1673a(c)(5).

6. 19 U.S.C. § 1673a(b)(1).

manufacture, production, or wholesale in the United States of a domestic like product" under subsection (D).[7]

By contrast, the statutory provisions governing the determination of export price (EP), constructed export price (CEP) and normal value (NV), refer to "the producer or exporter" of the subject merchandise.[8] Section 772(a) of the Act, for example, states that "[t]he term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise . . .". The term "exporter or producer" is expressly defined in the statute as

> the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate. For purposes of section 773, the term 'exporter or producer' includes both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise.

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7. Notably, section 771(9)(A) "also confers interested party status upon, *inter alia*, foreign manufacturer, producer, or exporter or the United States importer, of subject merchandise" but does not confer eligibility upon such entities to file antidumping or countervailing duty petitions.

8. *See* Sections 772(a) and (b), and 773(l)(B). 19 U.S.C. § 1677a . . . and § 1677b.

Notwithstanding the fact that the term domestic producers or workers and the term exporter or producer are separately defined in different provisions of the statute, the term "producer" is contained in both the provisions governing industry support and the provisions governing EP, CEP, and NV. The statute, however, does not define the term "producer."

2. *The Federal Circuit Decision in SKF USA*

In *SKF USA*, the Federal Circuit ruled that:

> In the antidumping statute Congress has used the term "foreign like product" in various sections, and has specifically defined it in 19 U.S.C. § 1677(16). We therefore presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently.

263 F.3d at 1382. The Federal Circuit stated that "[w]ithout an explanation sufficient to rebut this presumption, Commerce cannot give the term 'foreign like product' a different definition (at least in the same proceeding) when making the price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely the computation of normal value (or its proxy, constructed value) of the subject merchandise." *Id.* Citing the Supreme Court

decision in *Sorenson v. Treasury*, 475 U.S. 851 (1986), the Federal Circuit in *SKF USA* also noted that this "normal rule of statutory construction" applies with particular force where Congress has specifically defined the term. 263 F.3d at 1381-82.

In this case, however, the term "producer" is not defined in the statute. As we explain further below, to fulfill the legislative purpose of the different provisions at issue, the Department must engage in a different examination, and thereby define the term differently depending upon the context. Unlike the term "foreign like product," which is directed to the same computation of normal value, the term "producer" is being applied in distinct provisions of the statute and for different purposes, requiring different examinations by the agency.

However, even under the circumstances in *SKF USA*, where the term is expressly defined and is directed to the same computation, the Federal Circuit recognized that the agency could rebut the presumption, and interpret the same term differently provided it provides a reasonable explanation. *SKF USA*, 263 F.3d at 1382. Indeed, the Federal Circuit has now ruled on the issue in *SKF USA*, affirming the Department's use of different definitions based upon the agency's further explanation on remand. *FAG Kugelfischer Georg Schafer AG, Et Al, and SKF USA, Et Al v. United States*, 02-1500, 02-1538, 2003 U.S. App. LEXIS 11607 (June 11, 2003).

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3. *Discussion of "Producer" for Purposes of Industry Support*

As discussed above, for purposes of industry support, the statute defines the term "domestic producers or workers" by referring back to "those interested parties who are eligible to file a petition under subsection (b)(1) of this section."[9] Thus, to have standing to file a petition, or to support or oppose a petition, the same "interested party" requirements contained in the statute must be satisfied.

The statute, however, does not define the term "manufacturer" or "producer" of the domestic like product. Where Congress has not defined a term or otherwise indicated what criteria Commerce is to use in determining what constitutes a "producer," the agency has been granted broad discretion to establish its own methodology for determining who qualifies as a producer of the domestic like product. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). In the case of industry support, we believe any definition of such terms as "producer" or "manufacturer" must be informed by the statutory definition of the term "industry" that also appears in the industry support provisions discussed above.

The legislative history pertaining to the definition of the industry is instructive. The Statement of

9. Subsection (b)(1) expressly refers to an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9).

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Administrative Action accompanying the URAA clarifies that:

> The definition of domestic industry in Article 4 is virtually identical to that in the 1979 Code and current U.S. law. See S. Rep. No. 249, 96th Cong., 1st Sess. 47, 63 (1979); H.R. Rep. No. 317, 96th Cong., 1st Sess. 51, 59-60 (1979).

SAA at 811. In turn, the Senate Report accompanying the 1979 Act that is referred to in the SAA of the URAA above, states:

> The standing requirements in section 702(b)(1) for filing a petition implement the requirements of Article 2(1) of the agreement. *The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and to prohibit petitions filed by persons with no stake in the result of the investigation.*

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, *see id* at 63.

In determining who has standing to file petitions, the court in *Brother Industries (USA) Inc. v. United States* has recognized that "[t]he language in the legislative history is broad and unqualified. It contrasts industries suffering adverse effect with those having no stake: the former have standing; the latter do not." 801 F. Supp. 751, 756 (CIT 1992) (citing S. Rep. No. 249,

96th Cong., 1st Sess. 47 (1979))(*Brother*), *aff'd* 1 F.3d 1253 (Fed. Cir. 1993). In addressing the same statutory term "producer," the court in *Brother* recognized that "ITA has discretion to utilize any methodology reasonably suited to fulfilling the statutory goals." *Id.* at 757.

In exercising its discretion, the Department has adopted the ITC's six-factor test to determine whether a company is a producer of the domestic like product. Like the ITC, the Department's longstanding practice has been to examine the overall nature of a company's manufacturing operations.[10] "At a minimum, a finding that a company is a producer of the domestic like product requires that a company perform some important or substantial manufacturing operation." *LEU Industry Support Mem.*, at 7.

The Department adopted and applied this test to fulfill the statutory goals intended by Congress. Whether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product. Thus, the "stake in the result of the investigation" that

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10. *See, e.g., Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured. From Japan: Termination of Circumvention Inquiry ofAntidumping Duty Order*, 59 Fed. Reg. 23693 (May 6, 1994). In that case, Commerce determined that the U.S. company's limited manufacturing operations were not sufficient to confer domestic producer status upon the company.

Congress contemplated would justify the filing of a petition is not the interest of an industrial user in pursuit of lower priced goods. The legislative history makes clear: the law was intended to protect from dumped and subsidized imports those U.S. industries that are at risk of injury due to dumped or subsidized imports.[11] The Department's practice, like that of the ITC, therefore, reasonably recognizes that "whether a company is at risk depends on the nature and extent of its operations in the United States." *Brother*, 801 F. Supp. at 756 (citing the ITC's six-factor test).

Second, the legislative history indicates Congress' intent that the domestic producers in the industry would be engaged in the actual production of the domestic like product. The Senate Report states:

> The term industry is not defined in either the Antidumping Act or in section 303. As noted in the committee report on the Trade Act of 1974 (S. Rept. 93-1298, pp. 179-181), in practice, the phrase "an industry in the United States", as used in both laws, has been interpreted by the ITC as referring to *all the domestic producer facilities engaged in the production of articles like the subsidized or dumped imported articles*, although a number of investigations have been concerned with the

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11. Citing S. Rep. No. 96-249, 96th Cong., 1st Sess. 63 (1979), the court in *Brother* has recognized that "[t]he statute grants petitioner status to an industry that is at risk of injury due to dumped imports." *Brother*, 801 F. Supp. at 756.

> domestic producer facilities engaged in the production of articles, which while not like the imports concerned, are nevertheless competitive with the imports in domestic markets. In either case, *the industry has generally been considered to be a national industry involving all domestic facilities engaged in the production of the domestic articles involved.*

S. Rep. No. 249, 96th Cong., 1st Sess. 82 (1979) (emphasis added).

The Senate Report of the 1979 Act further states that:

> *Section 771(4) enacts in many respects current ITC practice,* and delineates important concepts with respect to the definition and treatment of the term "industry" as that term is used in determining whether an industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is being materially retarded. "Industry" generally means: (1) All the domestic producers who produce products like the imported articles subject to the investigation, or, if no such product exists, the product most similar in characteristics and in use to the imported article subject to the investigation. . . .
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> * * *

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> In examining *the impact of imports on the domestic producers* comprising the domestic industry, *the ITC should examine the relevant economic factors (such as profits, productivity, employment, cash flow, capacity utilization, etc.), as they relate to the production of only the like product*, if available data permits a reasonably separate consideration of the factors with respect to production of only the like product.

S. Rep. No. 249, 96th Cong., 1st Sess. 83-84 (1979) (emphasis added). As is clear from the legislative history, for the ITC to make its determination, it must examine data directly relevant to those companies with domestic facilities actually engaged in the production of the domestic like product, such as profits, productivity, employment, and capacity utilization "as they relate to production of only the like product." While the ITC's test is not binding upon the Department, the connection between the respective determinations cannot be ignored. Companies that have standing to file a petition should reasonably be those same companies at risk from dumped or subsidized imports. Accordingly, both agencies seek to identify domestic producers engaged in the actual production of the domestic like product.[12] Commerce's test fulfills the legislative purpose of the industry support provisions in the statute in that it recognizes that to be at risk from dumped or subsidized

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12. "The definition of domestic industry is important to the Commission's injury analysis and Commerce's initiation determination." SAA at 857.

imports reasonably requires a company, at a minimum, to be engaged in some important or substantial manufacturing operation.

By contrast, if the Department were to interpret its tolling regulation as applicable in the industry support context, and the Department were to apply that regulation in a manner so as to bestow domestic producer status upon industrial users and consumers of the domestic like product, or other entities that have no stake in the result of the investigation (as the term was intended by Congress), the industry at risk from unfairly traded imports would be denied the opportunity to obtain relief, thereby defeating the fundamental purpose of the law.

Other incongruities could also arise from such an application that would frustrate the intent of Congress. For example, by using very different tests, the Department and the ITC could reach significantly different determinations as to the domestic producers in an industry. Because of the significant differences in the tests, each agency could potentially identify different domestic producers, and therefore different industries. In our view, such anomalous results would be inconsistent with the intent of Congress because the adversely affected industry would be denied its opportunity for relief.

Another incongruity would arise in the industry support context with respect to domestic workers if the tolling regulation were to apply. In our view, such an

application would deprive domestic workers of the opportunity to obtain relief under the AD and CVD laws, and thereby defeat a fundamental object of the law.

The statutory provisions governing industry support establish that domestic workers are entitled to file and support petitions for relief from unfairly traded imports, as discussed above.[13] The SAA accompanying the URAA further clarified that the position of workers is equal to that of firms producing the domestic like product for purposes of the Department's industry support determinations. The SAA states:

> New sections 702(c)(4)(A) and 732(c)(4)(A) recognize that industry support for a petition may be expressed by either management or workers. The Administration intends that labor have equal voice with management in supporting or opposing the initiation of an investigation. Commerce's implementing regulations will make clear that in considering the views of labor, *Commerce will count labor support or opposition as being equal to the production of the domestic like product of the firms in which the workers are employed.*

SAA at 862.[14]

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13. "[W]orkers, as well as companies, may file and support petitions." Sen. Rep. 412, 103rd Cong., 2nd Sess., 35 (1994).

14 In implementing its regulation on industry support, Commerce discussed the position of workers in the preamble to its

(Cont'd)

We interpret the statute and the accompanying SAA to indicate that Congress intended the domestic workers to encompass those workers engaged in the actual production of the domestic like product. Moreover, the legislative history indicates that Congress intended that domestic workers, who are eligible to file petitions, to be those workers employed by the firms engaged in such production. Thus, the statute and SAA contemplate that the identification of the domestic producers must involve the identification of firms with workers and facilities that produce the domestic like product.

4. *Review of the Industry Support Determination in the LEU Investigations*

In this case, Commerce examined the production operations that were necessary to manufacture LEU. In determining whether USEC was the domestic producer of LEU, Commerce examined the nature and

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proposed regulation, stating that "[c]onsistent with the SAA at 862, an opinion expressed by workers will be considered to be of equal weight to an opinion expressed by management. Thus, for example, if a union expressed support for a petition, the Department would consider that support to be equal to the production of all of the firms that employ workers belonging to the union. On the other hand, if management and workers at a particular firm expressed opposite views with respect to the petition, the production of that firm would be treated as representing neither support for, nor opposition to, the petition." *Antidumping Duties; Countervailing Duties; Proposed Rule*, 61 FR 7307, 7314 (Feb. 27, 1996). *See also* 19 C.F.R. § 351.203(e)(3) (2000).

extent of USEC's manufacturing operations, finding that:

> USEC performs all of the processes necessary for enriching converted uranium. In fact, the Nuclear Regulatory Commission (NRC) requires enrichment facilities to be licensed in order to operate in the United States. The information on the record from the NRC indicates that USEC's two gaseous diffusion plants in Paducah, Kentucky and Portsmith, Ohio are the only facilities in the United States that are licensed to enrich uranium. Accordingly, USEC is the only company in the United States with the technology and the technical expertise necessary to produce LEU. And, all LEU produced in the United States must be enriched by USEC.
>
> Further, the information on the record indicates that enrichment is a major manufacturing process in the production of LEU, responsible for a substantial portion of the total value of LEU; and that enrichment is a necessary process for the production of LEU. Finally, we note that the product output from enrichment facilities is LEU, as defined in the petition.
>
> In light of the fact that USEC is the only entity in the United States that enriches converted uranium to produce LEU; is the only entity

> with the technology and technical expertise to produce LEU; that enrichment is a necessary and major manufacturing process in the production of LEU; and that the product output from USEC's enrichment facilities constitutes the domestic like product, we find that USEC is the only producer of LEU in the United States. Accordingly, we determine that petitioner accounts for 100 percent of LEU production in the United States.

LEU Industry Support Mem., at 4-5.

By contrast, Commerce determined that utility companies were purchasers of LEU rather than producers, finding that:

> the utility companies do not qualify as producers of LEU. These companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing. Unlike producers, we find that the utility companies are purchasers and industrial users of LEU.

Id. at 8 (citation omitted).

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Citing the ITC factors used by the Department in *Certain Portable Electric Typewriters from Singapore: Rescission of Initiation of Antidumping Duty Investigation and Dismissal of Petition*, 56 Fed. Reg. 49880 (Oct. 2, 1991), the agency stated, "[t]he utilities make no claim as to any of these factors." *LEU Industry Support Mem.*, at 8, n. 16. Nor is there any evidence on the record to indicate, or support the conclusion, that utility companies have satisfied any of the factors used to determine whether a company is a producer of the domestic like product.

The Department's determination comports with the remedial purpose of the law and the clear intent of Congress. The "stake in the result of the investigation" is not the interest of a consumer or industrial user in pursuit of lower priced goods, as discussed above. Rather, the law was intended to protect from unfair trade those U.S. industries that are at risk due to dumped or subsidized imports. The utility companies are not at risk of injury due to dumped or subsidized imports of LEU. To the contrary, as the Department determined: "[u]nlike producers, we find the utility companies are purchasers and industrial users of LEU." *Id.* at 8. "The principal use of LEU is for the generation of electricity." *USEC Petition*, Prop. Doc. 1, at I-9. It is undisputed that the U.S. utility companies are in the business of producing electricity for sale to consumers in the United States.[15]

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15. LEU is purchased by U.S. utilities for fabrication and manufacture into fuel subassemblies, which are used for nuclear reactors in the production of electricity." *USEC Petition*, Prop. Doc. 1, at I-9, The respondents have conceded this point as well. *See* Plaintiffs' Brief at 24, recognizing that "the utilities consume the nuclear fuel in their reactors."

As such, their business interest, like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down. Accordingly, unlike domestic producers, they have no stake in the result of these investigations, as envisaged by Congress.

As for the domestic workers, in this case, PACE, the union representing the workers engaged in the actual production of LEU, joined USEC in the AD and CVD petitions. The Department found that the domestic workers provided an independent basis for industry support. *LEU Industry Support Mem.*, at 5. By contrast, the utility companies were found to "have no employees dedicated to manufacturing [of LEU]." *Id.* at 8.

Finally, we find that any application of the tolling regulation for purposes other than the establishment of U.S. price and normal value also presents the potential incongruity of broadly defining the U.S. domestic industry based upon how an entity purchases or obtains the domestic like product, rather than upon its stake in the results of an investigation. For example, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. Accordingly, to the extent that Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign

utility companies would also qualify, by virtue of the tolling regulation, as members of the U.S. domestic industry. It is inconceivable how a foreign utility could be adversely affected by unfairly traded LEU in the United States. More importantly, in our view, such a result is not what Congress intended when it enacted the provisions on industry support. Nothing in the statute or the relevant legislative histories supports such a broad application of the AD and CVD laws. In our view, the application of the tolling regulation in this context would frustrate the intent of Congress because it would fail to provide an opportunity for relief for an adversely affected industry, and conversely would fail to prohibit petitions filed by persons with no stake in the result of the investigation, contrary to Congress' intent.

5. *"Producer" for Purposes of Establishing U.S. Price and Normal Value*

Unlike industry support determinations, where the legislative purpose of the provisions is to identify those entities that, by virtue of their facilities and workers dedicated to the production of the domestic like product, have a stake in the results of an investigation, the purpose of the provisions governing U.S. price and normal value is to identify the seller of the subject merchandise and foreign like product, as discussed below.

The term "producer" appears in the statutory provisions governing the establishment of U.S. price and normal value. As noted above, section 772(a) of the Act,

directed at export price, states that export price means "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation *by the producer or exporter of the subject merchandise.*"[16] Similar language on "producer or exporter" is contained in the constructed export price provision.[17] Under these provisions, the Department need not identify and select the foreign "producer" as the respondent in an antidumping investigation. For respondent selection, the statute provides that export or constructed export price may be established by the sale of either "the producer *or* exporter" of the subject merchandise. While the legislative histories of the trade acts provide no guidance as to whether the Department is to establish a preference for exporter over producer, the statutory provisions, including section 773(a)(1)(B) governing the determination of normal value, all focus upon the *price* of the subject merchandise or foreign like product.[18] Accordingly, the Department selects the respondent in an investigation or administrative review based upon which entity sells the subject merchandise and foreign like product.

In promulgating its regulation governing the calculation of U.S. price and normal value, and in particular the subsection addressing "subcontracting" or "tolling," the Department recognized that the focal point of the regulation is the sale of subject merchandise and foreign like product. Specifically, the relevant

16. 19 U.S.C. § 1677a(a) (emphasis added).

17. *See* 19 U.S.C. § 1677a(b).

18. *See* 19 U.S.C. § 1677b(a)(1)(B).

subsection of the regulation states the Department "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[19]

The regulation was promulgated to assist the Department in establishing U.S. price and normal value. Accordingly, for purposes of establishing U.S. price and normal value, the Department does not consider it essential that the entity selected as an appropriate respondent be engaged in any manufacturing operations. Rather, the traditional functions of a producer in this context are not essential to the determination of whether the entity sold the subject merchandise and foreign like product. To clarify further, producers frequently sell the merchandise they produce, and thus they may be identified and selected as the appropriate respondents. The relevant sale of subject merchandise, however, may be made by other companies, such as exporters. In such cases, the Department selects the exporter as the appropriate respondent.[20] This is also the case with resellers in proceedings in which the reseller has sold the subject merchandise. Thus, in this context, the

19. 19 C.F.R. § 351.401(h).

20. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707, (May 8, 2003) (selecting the Canadian Wheat Board as the mandatory respondent based upon its status as exporter of the subject merchandise).

performance of traditional producer functions, such as manufacturing operations in which value is added to the product, is not essential to the fulfillment of the object and purpose of the regulation, which is to establish U.S. price and normal value. Accordingly, the Department will select the exporter or reseller of subject merchandise over the producer, not based upon the producer's performance of any producer-type functions, but based upon the Department's determination of which entity sells the subject merchandise to or into the United States.[21]

In promulgating its tolling regulation, the Department indicated the relevance of the traditional manufacturing operations when it stated that "[t]he Department will not consider the subcontractor to be the manufacturer or producer regardless of the proportion of production attributable to the subcontracted operation or the location of the subcontractor or owner of the goods." *Antidumping Duties: Countervailing Duties: Proposed Rule*, 61 FR 7307,7330 (Feb. 27, 1996). In such cases, the Department looks to the seller of the subject merchandise as the

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21. *See, e.g.*, section 773(a)(1)(B) of the Act establishing normal value as "the price" at which the foreign like product is first sold. *See also* section 773(a)(3)(A), where producer knowledge "*at the time of the sale* that the merchandise was destined for exportation" is a factor in determining whether the producer's sale in the home market will be used to establish normal value. *See also Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan*, 64 FR 15493, 15498 (Mar. 31, 1999).

respondent, regardless of whether the seller has manufacturing operations. This definition of producer fulfills the purpose of the statute in that it enables the agency to establish as accurately as possible U.S. price and normal value for purposes of determining the margin of dumping.

Industry Support Conclusion

Based upon the above, the Department may interpret the term producer in the U.S. price and normal value contexts differently than in the industry support context, depending on the circumstances of the case, in order to fulfill the legislative purposes behind these provisions, as envisaged by Congress. With respect to the Department's tolling regulation, the Department has never applied its regulation on tolling for purposes of industry support because to do so would frustrate the intent of Congress to properly identify those domestic producers engaged in the production of the domestic like product, and thus it would fail to provide U.S. domestic industries with the opportunity to obtain relief as intended by Congress.

Comments from Parties

USEC[22] and the workers' union, PACE,[23] filed comments supporting the Department's analysis and

22. USEC Inc., and United States Enrichment Corporation (collectively USEC).

23. The Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO and Local 5-689 (PACE).

conclusion on industry support. These parties have also made suggestions to the Department for clarification purposes. We have made changes to the remand determination as appropriate for clarification purposes.

The Ad Hoc Utilities Group (AHUG) submitted comments on industry support. Urenco and Eurodif have not submitted comments on this issue, but have instead indicated their support and agreement with AHUG's comments. *Urenco/Eurodif Comments*, June 13, 2003, at 3, n. 2.

ABUG's Comments on Industry Support

AHUG advances several points to support its contention that the justifications provided by the Department's industry support determination do not satisfy the standard for giving the same term in the statute different meanings. AHUG's Comments, at 3. AHUG first contends that the Department's draft remand ignores the plain language of the statute, and relies instead upon legislative history that does not pertain to the applicable section of the statute. *Id.* at 4-5. AHUG further contends that the Department lacks authority to require manufacturing operations in order to determine whether entities are producers for purposes of industry support. *Id.* at 7. AHUG further asserts that the Department's practice does not require manufacturing operations for purposes of industry support. *Id.* at 7-8.

Next, AHUG argues that the Department's interpretation of the term "producer" in the industry support context contradicts the plain language of the statute and the Department's own regulation on tolling. *Id.* at 6. Instead, AHUG argues, the statute provides mechanisms for preventing domestic producers benefitting from unfairly traded imports from blocking initiation of investigations, while recognizing that such producers are still part of the domestic industry. *Id.* at 9. Finally, AHUG contends that it remains unclear whether USEC has a cognizable stake in the domestic industry.

Department Position:

At the outset, we note that, fundamentally, AHUG is arguing that the Department, as a matter of law, is prohibited from applying the ITC's 6-factor test to determine whether an entity is a "producer" for purposes of industry support. This same test has been expressly approved by Congress in the relevant legislative history, and was held to be a reasonable interpretation of the statute by the Court of International Trade in *Brother.* Accordingly, we have continued to apply the test in this case. Each of AHUG's points is discussed further below.

With respect to the relevance of the statutory definition of the term "industry" and its legislative history, AHUG contends that the Department is attempting "to avoid the plain language of the statute by asserting that the legislative history related to the definition of industry in Section 771(4) evidences

congressional intent to limit the domestic industry for industry support purposes to those entities with manufacturing facilities." *Id.* at 5. AHUG argues that, to the contrary, the legislative history confirms that Section 771(4) was intended to reflect and apply to the practice of the ITC in determining whether an industry is materially injured. AHUG claims that the statute plainly distinguishes between the analysis required for the ITC to identify the relevant industry to determine injury, on the one hand, and the domestic interested parties pertinent to the Department's industry support determination, on the other. According to AHUG, the Department cannot refer to legislative history of another, distinct provision to interpret already clear statutory language." *Id.* at 5.

We disagree with AHUG. Rather, we find that Congress intended the term "industry," as defined in section 771(4)(A) of the Act, to be relevant and applicable to the Department's analysis for purposes of industry support. First, as discussed in the body of the Department's remand determination above, to determine whether to initiate AD and CVD investigations, the statute directs the agency to examine whether the petition has been "filed by or on behalf of the industry" under sections 702(c)(4) of the Act for countervailing duties and section 732(c)(4) of the Act for antidumping duties. The legislative history that we relied upon, moreover, expressly refers to the standing requirements for filing a petition. The legislative history addressing the term "industry" states:

> *The standing requirements in section 702(b)(1) for filing a petition implement the*

> *requirements of Article 2(1) of the agreement.* The committee intends that they be administered to provide an opportunity for relief for an adversely affected industry and *to prohibit petitions filed by persons with no stake in the result of the investigation.*

S. Rep. No. 249, 96th Cong., 1st Sess. 47 (1979) (emphasis added). For AD, *see id* at 63. As discussed above, the court in *Brother* recognized the relevance of, and specifically relied upon, the same legislative history of the 1979 Act in affirming the Department's use of the 6-factor test to determine whether the entity at issue in that case was a producer of the domestic like product.[24] Finally, the SAA accompanying the URAA clarifies that:

> The definition of domestic industry is important to the Commission's injury analysis *and Commerce's initiation determination.* With the exception of conforming changes in terminology and . . . , section 222(a) of the bill does not change the basic definition of domestic industry in section 771(4)(A).

SAA at 857 (emphasis added). Accordingly, we do not accept AHUG's conclusion that the definition of the term

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24. AHUG dismisses the relevance of the court's decision in *Brother* because that decision pre-dated the adoption of the Department's tolling regulation. AHUG, however, does not address the court's reliance upon the legislative history pertaining to the term "industry" in that case and its relevance to the Department's determinations.

"industry" defined in section 771(4), and its legislative history, is not relevant to the Department's determinations on industry support.

Next, AHUG contends that the Department's application of the tolling regulation as limited to the context of defining the "producer or exporter" for EP or CEP is contradicted by the plain language of the statute and the Department's regulation on tolling. AHUG contends that "the tolling regulation, by its terms, applies to the identification of a 'manufacturer or producer.'" *AHUG's Comments*, at 6. AHUG argues that if the tolling regulation were focused solely on identifying the party responsible for the export price, it would not have substituted the term "manufacturer or producer" for the statute's use of the term "producer or exporter." AHUG concludes that the only reasonable interpretation of this difference in terminology is that the tolling regulation applies to toll manufacturing generally. Because established rules of statutory and regulatory construction require that regulations must be read to give effect to every word, AHUG asserts, the Department's interpretation of its tolling regulation is impermissible because it would replace the term "manufacturer" with the term "exporter." *Id.*

We disagree. First, by its own terms, the regulation states that the provision applies for purposes of establishing EP, CEP and NV, as discussed above. Thus, the plain language of the regulation supports the Department's interpretation that it is not applicable for purposes of industry support. Second, as discussed

above, the application of the regulation for purposes of determining industry support would be contrary to the intent of Congress established in the legislative history.

AHUG next contends that the Department's practice does not require manufacturing operations for purposes of determining industry support. *Id.* at 7. AHUG argues that the Department incorrectly relies upon *Industrial Belts and Components and Parts Thereof Whether Cured or Uncured. From Japan: Termination of Circumvention Inquiry of Antidumping Duty Order*, 59 FR 23693, 23694 (May 6, 1994) (*Industrial Belts From Japan*). According to AHUG, the salient issue in that case was not whether the company, Brecoflex, had manufacturing facilities, which it did, but rather whether the activities performed in the United States altered the essential nature of the imported merchandise such that it could be considered domestic like product. Based upon that inquiry, AHUG argues, that case has no bearing whatsoever on whether or not a tollee is required to have manufacturing operations to be counted as part of the domestic industry in an industry support analysis. *AHUG's Comments*, at 7-8.

We disagree. The Department has stated that to be a domestic producer, an entity, at a minimum, must engage in some important or substantial manufacturing operation. While it was established in *Industrial Belts From Japan* that Brecoflex engaged in some processing operations, *i.e.*, finishing and packaging, the Department found that the operations were not sufficient or adequate for the company to be considered a domestic producer.

Thus, the test applied in that case was not limited to whether Brecoflex had manufacturing facilities. To the contrary, the test allowed the agency to determine the nature and extent of Brecoflex's operations in determining whether the entity should qualify as a domestic producer. Thus, AHUG is correct in that having *some* manufacturing or finishing operation alone may not be sufficient to establish the entity as a producer of the domestic like product. This is a minimum requirement. In our view, *Industrial Belts From Japan* stands for the principle that, at a minimum, an entity must establish that it performs an important or substantial manufacturing operation to be considered a producer of the domestic like product. Accordingly, the decision in *Industrial Belts From Japan* is consistent with the decision in the instant case to consider the nature and extent of the manufacturing operations in determining whether the entity qualifies as a producer of the domestic like product.

Next, AHUG cites two cases, *Ferrovanadium From China and South Africa*[25] and *Live Cattle From Canada*,[26] to support its proposition that the Department's recent cases indicate that an entity need not have like-product manufacturing operations to be considered part of the domestic industry, and that the

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25. *Initiation of Antidumping Duty Investigations: Ferrovanadium From China and South Africa*, 66 FR 66398 (Dec. 26, 2001) (*Ferrovanadium*).

26. *Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico*, 63 FR 71886 (Dec. 30, 1998) (*Live Cattle*).

Department need not align its domestic industry determination with that of the ITC. *Id.* at 8-9. Specifically, AHUG contends that in *Ferrovanadium* three of the five petitioners were tollees with no like-product manufacturing of their own. In *Live Cattle*, AHUG contends, the Department included wholesalers of the domestic like product within the industry for purposes of industry support.

We disagree with AHUG's points. With respect to *Live Cattle*, the case involved wholesalers of the domestic lie product who qualified as interested parties, respectively, under subsection 771(9)(C), and associations thereof under subsection 771(9)(E) of the Act. *Live Cattle Industry Support Memorandum*, at 17. In the case of LEU, no party claims, nor does the evidence on record support a conclusion, that the U.S. utility companies are wholesalers of LEU. The Department's 6-factor test is to determine whether a company qualifies as a domestic producer, not a wholesaler, of the domestic like product.

With respect to tollees, in *Ferrovanadium*, a case initiated after the initiations of the LEU investigations, the Department made no affirmative finding that tollees are to be considered producers of the domestic like product. The notice of initiation indicates that the Department "received no opposition to the petitions." *Id.* at 66399. The Department found that two companies in that case, "BMC and Shieldalloy together account for 100 percent of U.S. product of ferrovanadium." Therefore, the Department had no need to address the

status of tollees in that case. There is no discussion of the tolling regulation and its application; and no industry support memorandum was prepared given the above facts as to BMC and Shieldalloy. The issue of which companies qualify as domestic producers and upon what basis was not an issue for purposes of initiation and was not addressed in a meaningful way in the initiation notice. Consequently, we believe that the status of the other companies in that case was not sufficiently highlighted and therefore the case should not be considered to represent a change in practice for the agency.

Instead, the Department's practice in this area is more clearly reflected in the recent case of *Certain Color Television Receivers from Malaysia and the People's Republic of China.*[27] In that case, the Department examined the operations of a toller to determine whether the entity was a producer of the domestic like product for purposes of industry support. The petitioning company submitted information on the 6-factors. The Department concluded that the company was a domestic producer because, *inter alia*, it added significant value in its CTV production and had substantial capital investment in its CTV production facility. *See CTV Industry Support Memorandum*, at 5. That decision went on to state that the Department's tolling regulation was not applicable for purposes of industry support determinations, based upon the language and purpose of the regulation to establish U.S. price and normal value.

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27. *Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers from Malaysia and the People's Republic of China*, 68 FR 32013 (May 29, 2003).

Id. In sum, the Department continues to maintain in practice the position that to be a domestic producer, a company must, at a minimum, engage in some important or substantial manufacturing operation, and that the 6-factor test continues to be an important part of the agency's practice with respect to determining whether an entity is a producer for purposes of industry support.

In its next point, AHUG contends that the Department's alleged requirement that producers have manufacturing facilities in order to prevent parties benefitting from unfairly traded imports from blocking initiation of investigation is unfounded. According to AHUG, Congress expressly provided a mechanism for discounting the opinion of members of the domestic industry when they are related to foreign producers or are importers of subject merchandise. AHUG argues that because Congress has already determined the precise circumstances under which a party's opinion may be disregarded on the basis that it benefits from dumped or unfairly subsidized imports, the Department cannot go beyond the existing statutory scheme to disqualify parties that are neither related to foreign manufacturers nor importers.

We disagree with AHUG on this point. First, the issue of whether an entity qualifies as a member of the domestic industry revolves around whether the entity has a stake in the results of an investigation, as discussed above, *i.e.*, whether the entity can be at risk from unfairly traded imports. AHUG's arguments as to other provisions of the statute, such as those governing the

treatment of domestic producers who are related to foreign producers, and who are importers of subject merchandise, do not shed light on how the Department is to interpret the term "producer" for purposes of industry support in the first instance. We note, moreover, that AHUG has not attempted to explain how the utility companies, under any scenario, would be at risk from unfairly traded imports of LEU. Apart from legal arguments concerning the interpretation of the language of the statute and tolling regulation, and the relevant legislative histories, AHUG makes no argument as to why Congress would have intended to extend the relief available under the AD and CVD laws to cover entities which are not at risk from unfairly traded imports.

As a final matter, AHUG argues that it remains unclear whether USEC has a cognizable stake in the domestic industry. *AHUG Comments*, at 10. AHUG states that it is a matter of public record that USEC imported 5.5 million SWUs from Russia in 2000. AHUG points out that USEC exports the great majority, if not all, of the LEU produced at the U.S. facilities, while it delivers Russian origin material to U.S. utility companies. AHUG complains that the Department has not dealt with the legal implications of allowing a company to use the trade remedy law to protect sales in the United States of its imports from a third country, rather than domestic production." *Id.*

We note first that AHUG does not set out a legal basis for the Department to undertake the analysis it suggests, nor any statutory provisions that would

support such an examination. We note, for example, that the statute contains no public interest provision. Instead, the statute states that an antidumping proceeding "shall be initiated whenever an interested party" alleges the necessary elements under section 731 of the Act. The statute does not require, nor provide a basis for, the Department to determine whether to initiate an investigation based upon how a producer disposes of its domestic production, whether it sells it abroad or in the United States. The relevant issues for determining industry support in the 20-day period following the filing of a petition involves, *inter alia*, resolution of whether the entity is a producer of the domestic like product, and whether there is sufficient industry support for the petition for purposes of initiation. To the extent a domestic industry is materially injured by unfairly traded imports from the countries identified in the petitions, the law provides a remedy to the domestic industry, regardless of which markets domestic producers choose to serve by virtue of their sales of the domestic product.

Second, we note that if the facts are as AHUG suggests, i.e., that USEC sells its domestic production abroad, but sells its Russian SWUs to U.S. utility companies, then the potential incongruity of applying the tolling regulation in the industry support context, as discussed in the body of this remand determination, would be present in this case. As noted above, if U.S. utilities, by virtue of the tolling regulation, could qualify as domestic producers of LEU based upon how the contractual arrangements are structured, then any

entity that obtains LEU from a U.S. enricher, under similar contractual arrangements, could also qualify as a member of the U.S. domestic industry. We noted, therefore, that to the extent Japanese, French or British utility companies, for example, obtain LEU from USEC under similar arrangements as U.S. utilities, then these foreign utility companies would also qualify, by virtue of the tolling regulation, as members of the U.S. domestic industry. Under the facts presented by AHUG, however, USEC sells its domestic production abroad, but sells its Russian LEU, downblended from HEU, to the U.S. utilities. Thus, apart from the incongruity of applying the tolling regulation in this context, such an application in this case would not establish the U.S. utilities as domestic producers of LEU. We believe, therefore, that the facts in this case further demonstrate the potential incongruity of applying the tolling regulation in the industry support context, consistent with the reasons stated above.

B. THE AGENCY'S TOLLING REGULATION

a. *The Department's Analysis Under the "Tolling Regulation"*

In making its final affirmative determination, the Department examined and addressed, *inter alia*, the distinct issues of whether the AD and CVD law applies to LEU entering the United States pursuant to enrichment contracts; and separately, whether foreign enrichment companies are the appropriate respondents in the AD investigations, based upon the Department's tolling regulation and application to the facts in this case.

Appendix G

(i) *Scope of the AD and CVD Law*

Separate from our analysis and conclusions in the final determinations with respect to the Department's tolling regulation, we determined that "all LEU from the investigated countries entering the United States for consumption is subject to the AD and CVD laws." *Final French AD Determination*, 66 FR at 65878. In making that determination, we stated that "the AD and CVD laws were enacted to address trade in goods." We further stated that "the issue of whether merchandise entering the United States is subject to the AD and CVD laws depends upon whether the merchandise produced in, and exported from, a foreign country is introduced into the commerce of the United States." *Id.* We also found that:

> In these investigations, no party disputes that the LEU entering the United States constitutes merchandise. As the product yield of a manufacturing operation, the Department continues to find that LEU is a tangible product. Second, it is well established, and no party disputes, that the enrichment process is a major manufacturing operation for the production of LEU, and that enrichment is a required operation in order to produce LEU. Thus, we find that the enrichment process constitutes substantial transformation of the uranium feedstock. We continue to find, therefore, that the LEU enriched in and exported from Germany, the Netherlands, the

United Kingdom and France is a product of those respective countries.

66 FR at 65879.

We also stated that "the LEU at issue (i.e., under SWU or enrichment transactions) enters the commerce of the United States. Thus, the question of whether enrichers sell enrichment processing, as compared to LEU, is not relevant to the issue of whether the AD and CVD law is applicable. Rather, it is only relevant in these investigations for purposes of determining how to calculate the dumping margin and how to determine who is the producer/seller of subject merchandise." *Id.*

With respect to arguments raised that enrichment is a service beyond the scope of the AD and CVD law, we noted, *inter alia*, that "reference to the term 'services' mischaracterizes the nature of enrichment operations, and attempts to place a major manufacturing operation which produces merchandise squarely outside the realm of trade in goods, based solely upon the way in which particular sales of such merchandise are structured." *Id.*

Some parties argued that the AD and CVD laws are inapplicable because the utility companies cannot be considered the sellers of subject merchandise since they do not sell LEU, but instead sell electricity to U.S. consumers. These parties concluded that the law is not applicable because no entity sells the subject merchandise. In that context, we stated that "[i]t does not matter whether the producer/exporter sold subject

merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States." *Id.*

The Department also addressed respondents' and AHUG's arguments that the tolling regulation provides a basis for obtaining an exemption under the law for the LEU at issue, stating that "we do not interpret section 351.401(h) of the Department's regulations to be relevant or applicable in determining whether merchandise entering the United States is subject to the AD and/or CVD laws." *Id.* 66 FR at 65880. The Department stated:

> Instead, section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price and normal value," and not for the purpose of determining whether the AD and/or CVD laws are applicable. Our interpretation that the tolling regulation is intended solely for purposes of calculating dumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.
>
> Furthermore, in practice, we have never applied, nor relied upon, section 351.401(h) to exempt merchandise from AD proceedings,

> nor have we ever applied the provision in CVD proceedings. Moreover, our application of the tolling regulation in SRAMs from Taiwan does not support AHUG's or respondent's claim for exemption from the AD and CVD laws. In that case we applied the tolling regulation, seeking to determine which party made the relevant sale of subject merchandise.

Id. 66 FR at 65880 (citations omitted).

(ii) *Determination of the Producers of Subject Merchandise*

The Department determined that the foreign enrichers are the producers of the subject merchandise for purposes of establishing U.S. price and normal value for several reasons. First, the Department found that "the enrichment process is such a significant operation that it establishes the fundamental character of the LEU." *Id.* 66 FR at 65884. "Second, the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation. Third, utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *Id.* Finally, the Department reasoned that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *Id.*

Appendix G

b. *The Court's Remand on the Department's Tolling Regulation*

The Court has now remanded this issue to the Department for further reconsideration of its decision not to apply the tolling regulation in this case. *USEC*, Slip Op. 03-34, (Mar. 25, 2003). In reviewing the case, the Court stated that the circumstances in this case largely resemble the tolling arrangements seen in earlier determinations by the Department. The Court noted that, like the producer, Akai, in *Certain Forged Stainless Steel Flanges from India*, the utilities in this case direct and control the process of producing the merchandise, i.e., nuclear fuel. Using contractors at each step, the Court noted, they coordinate the production of uranium, LEU, and fuel rods. As in *Polyvinyl Alcohol from Taiwan*, where the contracting company provided the material to be processed, the utilities in this case provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of UF6 and can make the decision as to how much UF6 versus how many SWUs to purchase in a given transaction. *USEC*, at 22-23.

The Court examined the contracts, finding that SWU contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. The Court also found that the utility customer retains title to the feed uranium until it is enriched. Upon enrichment and delivery of the LEU, the title to the feed is considered extinguished and the

customer gains title to the LEU. *Id.* at 23. The Court also found it significant that the contracts for LEU state that once the separative work is performed and the LEU is delivered, the feed material shall be deemed to have been enriched; whereupon the customer takes title to the LEU associated with such feed material and title to the feed material will be extinguished. *Id.* The Court found that "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." *Id.* at 24. Based upon its examination of the contracts, the Court found that the SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. The Court concluded that "the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind." *Id.*

Moreover, the Court found that the designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flames from India*, where the Department found these companies to be producers of the subject merchandise. In the case of LEU, the Court found that the designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U235 needed by that

reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id.* at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id.* at 25.

Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise." *Id.* The Court concluded that "if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decision were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU." *Id.* at 26-27.

The Court then examined the Department's grounds for treating the enrichers as producers. Finding unpersuasive the Department's basis that the enricher's operations establish the fundamental character of LEU, the Court reasoned that in prior tolling cases, it has been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into subject merchandise. In the case of LEU, the Court noted, the enricher transforms feed uranium into LEU. "Yet, as in earlier cases, while the enricher's

operations create the 'essential character' of LEU, the enricher does not acquire ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU." *Id.* at 27-28. Second, the Court found unpersuasive the Department's conclusion that enrichers control the production of LEU under SWU contracts because, like Akai in *Certain Forged Stainless Steel Flanges from India*, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id.* at 28-29. Third, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, once again, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id.* at 29. Finally, the Court found unpersuasive the Department's basis that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." The Court noted that under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Again, the Court reasoned that the agency previously distinguished toll-produced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *Id.* at 30.

The Court, therefore, concluded that it could not "reconcile the Department's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are 'functionally equivalent' and '[i]t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced the subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States.'" *Id.* at 30-31. The Court stated that "Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased." *Id.* at 31.

The Court found that the SWU transactions do not contemplate the sale of the completed product, and do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *Id.* at 32. The Court pointed out that the Department previously recognized "where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping law." *Id.* at 32-33.

Appendix G

In remanding the case, the Court acknowledged that "[w]hile Commerce correctly states that 19 C.F.R. § 351.401(h) does not 'exempt merchandise from (antidumping) proceedings,' the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins." *Id.* at 33 (citations omitted). The Court noted that the Department is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. The Court found that "Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases . . . represents a departure from the practice authorized by a regulation 'having the force and effect of law.' As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations." *Id.* at 34 (citations omitted).

Because the Department's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, were found to be unpersuasive, the Court concluded that the Department's decision "to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law." *Id.* at 34-35. Accordingly, the Court remanded this case for the Department to reconsider

its decision not to apply the tolling regulation. *Id.* at 34-35, and 40.

a. *Analysis and Discussion of the Department's Tolling Regulation*

In accordance with the Court's direction, the Department has reconsidered the application of its tolling regulation in these investigations. Pursuant to that reconsideration, the Department has determined that the enrichment companies are the producers of LEU, and thus are the appropriate respondents for purposes of establishing the U.S. price of the subject merchandise and its normal value. An examination of the facts of this and prior determinations on tolling arrangements is discussed below.

(i) *The Tolling Regulation*

The Department's regulation addressing the "calculation of export price, constructed export price, fair value, and normal value" states that "[i]n general terms, an antidumping analysis involves a comparison of export or constructed export price in the United States with the normal value in the foreign market. This section establishes certain general rules that apply to the calculation of export price, constructed export price, and normal value." 19 C.F.R. § 351.401(a). One of the general rules promulgated by the Department speaks to the treatment of subcontractor or tolling situations. That provision states that the Department "will not consider a toller or subcontractor to be a manufacturer or

producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 CFR § 351.401(h).

As a general rule, the language of the tolling subsection was intended to "establish[] certain conditions under which the Department will not find a toller or subcontractor is the producer of the subject merchandise." *Final Results of Antidumping Duty Administrative Review: Polyvinyl Alcohol From Taiwan*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*). In administering the regulation, the Department has consistently stated that "[t]he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France*, 66 FR at 65878; *Taiwan Semiconductor Manufacturing Co. Ltd. v. United States, Remand Determination*, (May 2, 2000), at 4 (*SRAMs from Taiwan*).[28] In practice, the Department has also recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. More specifically, the Department has recognized that it is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id.*

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28. The text of this determination can be found on the Department's Internet site at http://ia.ita.doc.gov/remands/00-48.htm.

Appendix G

The Court has cited several administrative determinations in which the facts appear to be similar to the facts of the instant case.[29] The Department has closely examined the facts and determinations made in those cases, and the facts in the instant case. Based upon our analysis and the express purpose of the tolling regulation, we have concluded that the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is designed to implement, as discussed below.

A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. As discussed above, the tolling regulation focuses upon the sale of subject merchandise. It states, in part, that the Department will not consider the toller to be the manufacturer or producer where the toller "does not control the relevant sale" of the subject merchandise or foreign like product. In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject

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29. *Polyvinyl Alcohol from Taiwan: Final Results of Antidumping Duty Administrative Review*, 63 FR 32810, 32813 (June 16, 1998) (*Polyvinyl Alcohol from Taiwan*); *Taiwan Semiconductors Mfg Co. v. United States*, 143 F. Supp. 2d 958, 966 (2001); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Forged Stainless Steel Flanges from India*, 58 FR 68853 (Dec. 29, 1993) (*Flanges from India*); *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 FR 53641, 53642 (Oct. 6, 1998) (*Pasta from Italy*).

merchandise. In the preamble to its proposed regulation, the Department stated "where a party owning the components of subject merchandise has a subcontractor manufacture or assemble that merchandise for a fee, the Department will consider the owner to be the manufacturer, because that party has control over how the merchandise is produced and *the manner in which it is ultimately sold.*" *Antidumping Duties: Countervailing Duties: Proposed Rule*, 61 FR 7307, 7330 (Feb. 27, 1996) (emphasis added) (*Proposed Rule*). The Department illustrated how it anticipated the regulation would work, stating as follows:

> For example, where Firm A sends raw materials to a subcontractor for finishing before Firm A sells the finished goods to the United States, the Department will base export price or constructed export price on the price charged by Firm A (or its U.S. affiliate) for the finished goods. Similarly, the Department will base normal value on Firm A's sales of the finished goods in its home market . . .

Proposed Rule, 61 FR at 7330.

In promulgating the tolling regulation, the Department only anticipated the situation in which both the toller and the tollee would make sales that could be construed as sales of subject merchandise. In the above illustration, the Department anticipated that Firm A, the tollee, would be selected as the respondent because the

price Firm A charges is for the finished goods (*i.e.*, the subject merchandise). In its practice under the regulation, the Department has consistently faced a choice of respondents, based upon its analysis of the sales made by two entities – the toller on the one hand, and the tollee on the other, for all prior cases addressing tolling arrangements, including those referenced by the Court. In each of these cases, the tollee made sales of subject merchandise.

In *SRAMs from Taiwan*, for example, the Department was faced with a choice between sales made by TSMC, a foundry and a seller of wafer processing for a fee; and sales made by the U.S. design house, a seller of SRAMs to unaffiliated customers in the United States. *SRAMs Remand Determination*, at 5. In making its determination, the Department analyzed not only the foundry's sales of wafer processing, but also the sales made by the tollee, the U.S. design house, stating "we found that it was appropriate to treat the design house as the manufacturer, rather than TSMC in accordance with 19 CFR 351.401(h), because we concluded that the relevant sale was the sale between the design house and its customers." *SRAMs Remand Determination*, at 3 (citing *SRAMs Final Determination*), and 5.[30] *See also*

30. In the *SRAMs Remand Determination*, the Department also noted that "*[w]e normally consider the producer to be the party that sets the price* to the United States except in cases where the producer does not know that the subject merchandise is ultimately destined for the United States. In those cases, we find that a subsequent reseller controls the relevant sale, rather than the producer." *SRAM Remand Determination*, at n.4 (citation omitted) (emphasis added).

Flanges from India, 58 FR at 68856 (where Akai, the respondent selected by the Department, sold the flanges in question in the United States); *Pasta from Italy*, 63 FR at 53642 (where the respondent, Corex, was "solely responsible for the marketing and sales of the product"); *Final Determination of Sales at Less Than Fair Value: Chrome-Plated Lug Nuts From Taiwan*, 56 FR 36130, 36131 (July 31, 1991) (*Lug Nuts From Taiwan*) (where the Department found the respondent, Gourmet, to be the seller of the subject merchandise); *Polyvinal Alcohol from Taiwan*, 63 FR 32810, 32811-32813 (June 16, 1998) (where producers, Chang Chun and DuPont, both sold the subject merchandise); *Notice of Final Determination of Sales at Less Than Fair Value; Collated Roofing Nails From Taiwan*, 62 FR 51427, 51435 (Oct. 1, 1997) (*Roofing Nails From Taiwan*) (where all production of subject merchandise is the property of, and sold by, the tollee). None of the prior cases provides guidance to the Department on its selection of the appropriate respondent where the tollee does not sell the subject merchandise. As noted above, we have recognized that "the regulation does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan*, 63 FR at 32813. In some cases, we must make a determination based upon "the totality of the circumstances presented" in order to determine the appropriate respondent in a given case. *Id.*

In the case of LEU, all parties agree that the utility companies do not sell LEU. *Final French AD Determination*, 66 FR at 65879. As discussed above, the

utility companies are in the business of producing electricity for sale to consumers in the United States. To the extent that "the purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value," identifying the utility companies as the respondents would frustrate the purpose of the regulation to establish U.S. price and normal value for purposes of calculating dumping margins.

In light of the facts of this case, we must examine the totality of the circumstances in order to select the appropriate respondents in this case, as we did with respect to Perry in *Polyvinyl Alcohol from Taiwan.* Importantly, it was previously established in the case of LEU that enrichment is a required operation for the production of LEU; and that the enrichment process is a major manufacturing operation. *Final French AD Determination*, 66 FR at 65879. The Department found that enrichment accounts for an estimated 60 percent of the value of the LEU entering the United States. *Id.* at 65881. Thus, the Department concluded that "the enrichment processing adds substantial value to the natural uranium and creates a new and different article of commerce and therefore confers a different country of origin upon the product for purposes of the AD and CVD law." *Id.*

Further, the LEU at issue enters into the commerce of the United States. *Id.* The merchandise enters the customs territory of United States through U.S.

Customs ports of entry. Further, the merchandise is introduced into the commerce of the country for purposes of consumption in the United States. In every instance, the utility companies obtain LEU, a separate and distinct product of the respective country subject to investigation, under either an EUP transaction in which the full value of the LEU is contained in the contract, or through separate transactions for the purchase of the natural uranium feed component and the enrichment component. Given these facts, the Department has recognized that in every instance in which the utility customer obtains LEU for use in the generation of electricity, the merchandise is entering the commerce of the United States.[31]

The Department has recognized that once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value, in order to calculate whether, and if so to what extent, dumping has occurred.

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31. The Uruguay Round Agreements Act implements the international obligations made by the United States with respect to, *inter alia*, the Antidumping Agreement. In particular, Article 2.1 of that Agreement states that "a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." As noted above, in this case it is beyond dispute that the LEU at issue is being introduced into the commerce of the United States.

As discussed above, the regulation does not contemplate the circumstances of this case. Moreover, the statutory provisions governing the establishment of U.S. price are silent as to how the Department is to calculate the price of the subject merchandise in such circumstances.[32]

In our view, the facts in this case warrant a determination based on the totality of the circumstances, as it did with respect to Perry in *Polyvinyl Alcohol from Taiwan*, in order to select the appropriate respondent consistent with the limited purpose of establishing U.S. price and normal value. Based upon the totality of the circumstances in this case, we find that the enrichers are the producers of the subject merchandise because: (1) the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value; (2) the enrichers are the only companies engaged in the production of LEU, whereas the utility companies have no LEU production or manufacturing operations; (3) the enrichers control the production of MU; and (4) utility companies are industrial users and consumers of LEU. Apart from the determination of the producers, we also find that the enrichers are the

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32. For normal value, section 773(a)(4) states that "If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(1), then . . . the normal value of the subject merchandise may be the constructed value of that merchandise . . ." Section 773(e) states, in part, that the constructed value of imported merchandise shall be an amount equal to the sum of "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . ." *See* section 773(e)(1). 19 U.S.C. § 1677b(e)(l).

exporters of the subject merchandise, and therefore, separately qualify as the "exporters or producers" of the subject merchandise under the circumstances of this case. Each of these points, and its relevance, is discussed below.

(ii) *The Relevant Sales*

Prior to changing its practice with respect to subcontracting or tolling, as codified in the tolling regulation, the Department calculated dumping margins in tolling situations based upon the sale of the processing, where such processing involved substantial transformation and conferred country of origin on that product. In *Color Television Receivers, Except for Video Monitors, from Taiwan: Final Results*, 55 FR 47093, 47100 (Nov. 9, 1990), for example, where a Taiwan company assembled third-country parts supplied by a Hong Kong company, the Department treated the Taiwan company, the toller, as the producer and exporter, and based U.S. price upon the tolling fee charged by the Taiwan company to the Hong Kong company for the assembly. In *Final Determination of Sales at Less Than Fair Value: Certain Headwear from the People's Republic of China*, 54 FR 11983, 11988, (Mar. 23, 1989), the respondent, a Chinese company, toll-processed material supplied by a Hong Kong company into subject merchandise, and the Department based U.S. price on the fee paid for processing. Similarly, in *Certain Small Diameter Welded Carbon Steel Pipes and Tubes from the Philippines: Final Determination of Sales at Less Than Fair Value*, 51 FR 33099, 33100 (Sep. 18, 1986), a

U.S. importer purchased material inputs in Thailand and contracted with a toller in the Philippines to manufacture the inputs into pipe and tube. There, the Department treated the Philippine company as the respondent and calculated the margin for tolled sales based upon the price of the tolling charged by the Philippine company to the U.S, importer. In all of these cases, the producer, and thus the one selected by the Department as the respondent, was the entity actually engaged in the manufacture or production of the subject merchandise.[33]

The tolling regulation was promulgated to change the Department's practice in this area in order to calculate dumping margins based upon the full value of the sales of subject merchandise. Since the adoption of the tolling regulation, the Department has stated its preference to select the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise). *See SRAMs Remand Determination*, at 4-5. In that case, the Department also stated that "[b]ecause a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export price (or constructed export price) cannot be derived from the subcontractor's 'sales.'" *Id.* at 4.

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33. *See also Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from Canada*, 51 FR 44319 (1986); and *Brass Sheet and Strip from Canada: Final Affirmative Determination of Circumvention of Antidumping Duty Order*, 58 FR 33610 (1993).

Our statements in that case, however, do not address the situation where the full value of the merchandise may not be reflected in any one transaction in the chain of commerce.[34] We did not intend to imply in *SRAMs from Taiwan* that a transaction cannot be subject to the antidumping law unless the price charged includes 100 percent of the value of subject merchandise. Nor did we intend to imply that a toller can never be selected to be a respondent, even in the situation where the tollee does not sell the subject merchandise, but rather uses or consumes such merchandise in its own production process. Accordingly, even if one were to focus solely upon the cash price paid by a utility customer in a SWU transaction, the fact that the cash price paid to the enricher may reflect less than 100 percent of the value of the imported LEU does not mean that the transaction is beyond the scope of the AD law. Transactions may occur whereby a party that might be considered a toller produces subject merchandise and transfers ownership to that merchandise to the purchaser (tollee) for consideration. As discussed below, under relevant Federal Circuit precedent, such transactions involve sales of subject merchandise.

In sum, our statements made in *SRAMs from Taiwan* fail to reflect the Department's authority to calculate margins where relevant sales may exist for

34. We note that, in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher.

purposes of calculating the U.S. price and normal value of the merchandise. Where relevant sales exist that can form the basis of the price of subject merchandise and foreign like product, the Department must exercise its authority to examine those sales and determine whether, and if so, to what extent, dumping has occurred.

Polyvinyl Alcohol from Taiwan is also instructive in this context in that it demonstrates, to some extent, the flexibility the Department has in administering the provisions governing the establishment of U.S. price and normal value. In that case, the Department rejected the US. importer's claims that it, Perry, was the producer of the subject merchandise, even though it had sold the subject merchandise and purchased the major input, vinyl acetate monomer VAM), that was delivered to the processor, Chang Chun, to be manufactured into polyvinyl alcohol (*i.e.*, subject merchandise). Instead, the Department found Chang Chun, the processor, to be the producer. While the Department found that "the mere rearrangement of Perry's contractual relationship with Chang Chun insufficient to establish Perry as a producer of PVA," it is important to recognize that "Perry continued to purchase PVA from Chang Chun, albeit in two separate transactions instead of through a single purchase of the finished product." 63 FR at 32814. Accordingly, to calculate the price of the subject merchandise sold to Perry in that case, the Department added together the values from these two transactions to determine the U.S. price of the subject merchandise. *Id.* at 32815. Although the two relevant sales that were combined in that case – one sale of the processing and

one sale of the material inputs – were made by affiliated companies, the case, nevertheless, is instructive in that it recognizes that the sale of subject merchandise may occur in two distinct transactions, as compared to the traditional stand-alone transaction for the sale of subject merchandise, Second, it recognizes that the statute, while not addressing this situation, accommodates the interpretation that such relevant sales may be combined to derive, and calculate, the price of the subject merchandise.

In the case of LEU, as in the case of *Polyvinyl Alcohol from Taiwan*, the Department seeks to obtain the full value of the subject merchandise that has entered the commerce of the United States. Accordingly, in this case the Department calculated the price of the subject merchandise by combining the price of the enrichment component with the value of the natural uranium feed component to obtain the full value of the subject merchandise sold to U.S. utility companies. *Final French AD Determination*, 66 FR at 65885. The Department stated that

> In assigning a specific monetary value to the natural uranium component, we estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. For SWU contracts, when comparing U.S. Price with Normal Value based on constructed value, we valued natural uranium using exactly the same value for both sides of the equation. For

> example, for any given shipment pursuant to a SWU contract we determined the quantity (i.e. kgs) of associated feed uranium by applying the industry standard formula for product and tails assay specified in the contract. We valued this quantity using POI average per kg price for natural uranium charged by enrichers. This exact same amount was included in normal value.

Id.

Based upon the way in which the utility companies obtain LEU in these circumstances, we find that the transactions between the enrichers and the utilities are relevant for purposes of establishing the price of the subject merchandise for a number of reasons. First, these sales represent the transfer of ownership in the complete LEU product for consideration. Based upon the contracts and other evidence of record, we find that the enrichers own, and hold title to, all the LEU they produce. The enrichers transfer ownership of, and title to, the LEU to the utilities upon delivery of the merchandise for consideration. Second, because the completed product is entering the commerce of the United States through these transactions and because the pricing behavior of the foreign enrichers is relevant to the issue of whether the LEU is being sold at less than fair value, we find that the enrichers' sales are relevant sales for purposes of establishing the U.S. price of the subject merchandise and its normal value under the facts and circumstances of this case. Each element is discussed below.

First, in this case, whether under EUP contracts or SWU contracts, the enrichers own, and hold title to, all the LEU they produce. In SWU contracts, the utility customers hold title to the natural uranium feedstock that they provide to the enrichers.[35] The contracts state that the enrichers transfer title to the LEU to the utilities upon production *and* delivery of the LEU.[36] At the time of delivery, title to the LEU is transferred to the customer, and title to the feed material is extinguished.[37] Based upon the terms of the contracts, the utility customers retain title to the feed material until such time as the LEU product is delivered to the destination specified in the contract. As the Court has recognized, however, "[t]hese contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer." Slip Op. 03-34, at 24. Accordingly, at the point

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35. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*].

36. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*].

37. *See, e.g.*, Urenco Questionnaire Response, Vol. 1, Attachment B-1, [*]. *See also* Attachment B-3, between [*] and Urenco, at [*]; and Attachment B-2, between [*] and Urenco, at [*] (stating that [*]. For Cogema/Eurodif contracts, *see, e.g.* the [*] and [*]; and in the contract between [*], *see also* the contract with [*]. The above contracts demonstrate that substantial evidence on the record reflects a standard approach in the industry with respect [*].

in time in which the enricher produces the LEU but before delivery is performed, the customer only holds title to the natural uranium feedstock provided to the enricher under the contract. The customer does not hold title to the LEU, nor does she hold title to the feed material contained within the recently produced LEU because the LEU produced by the enricher cannot be identified as having been derived from the feedstock provided by any particular customer. The terms of the contracts at issue indicate that at this point in time, the customer only has title to the feed material. The enricher, by contrast, would have rights as to the LEU.

Moreover, the record indicates that LEU delivered to a utility customer by an enricher under an enrichment contract may be produced before any natural uranium supplied by that customer could have been part of the production process for that LEU, thereby making it impossible to conclude that the LEU produced and delivered by the enricher is in any way derived from the uranium supplied by the customer. Based upon the above, we find that between the time in which the LEU is produced and the time in which it is delivered as specified under the contract, the enricher holds title and holds ownership in the complete LEU product. Because, under the terms of the contracts, the utility customers have no right of ownership with respect to the LEU that is produced, but not delivered, we find that the enrichers own the LEU, including the right to sell the LEU at issue to any buyer. Therefore, we find that the enrichers own all the LEU they produce.

Moreover, we find that enrichers make a relevant sale when they transfer ownership of the complete LEU to the utilities through the delivery of such merchandise for consideration. In *NSK Ltd. v United States*, the Federal Circuit addressed the meaning of the term "sold" in the definition of exporter's sales price (now CEP). In that case, the Court held that the term "requires both a transfer of ownership to an unrelated party and consideration." 115 F3d 965, 973 (Fed. Cir. 1997) (*NSK*). *See also AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000).

As discussed above, the contracts in this case provide that title to the LEU product is transferred to the customers upon production and delivery of the LEU. At the time of delivery of the LEU product, the contracts provide that the utilities' title to the natural uranium feedstock is extinguished. Under the terms of the contracts at issue, the enrichers transfer ownership of the LEU upon delivery of the LEU. Accordingly, we find that the enrichers transfer title to, and ownership in, the complete LEU upon delivery of the LEU as specified under the contracts. Thus, under the test in *NSK*, the sales at issue in this case represent the sale of subject merchandise in that they are transfers of title to, and ownership in, the subject merchandise for consideration.

We have also examined the transfer of title in *SRAMs Remand Determination*. In that case, we placed little weight on the fact that the foundry held temporary title to the finished SRAM wafers and transferred title to the designs house. We stated that "while TSMC may

have held temporary title to the SRAM wafers in order to indemnify itself against the potential for loss, it did not, and could not, control the sale of these finished wafers because it never owned the intellectual property which is embodied within them." *Id.* at 5. In light of the decisions in and *NSK* and *AK Steel* we believe the Department was not precluded from selecting the foundry as the respondent in that case. Both entities, the foundry and the design house, held title to the finished product seriatim. In that case, however, the Department was faced with a choice of respondents, and used those sales that contained the full value of the subject merchandise, as contemplated by the regulation. Because the design house also owned the finished wafer, including the intellectual property contained within it and subsequently sold the subject merchandise, the Department selected the design house as the appropriate respondent.

There is, however, another important difference in these cases. In the case of LEU, the record shows that enrichers hold inventories of uranium from various sources, including uranium owned by the enricher itself, and produce LEU without relying solely upon the input from a particular customer.[38] This contrasts with the situation of the SRAM foundry in which the foundry does not own the intellectual property pertaining to the wafer design and "has no right to sell those wafers to any party other than the design house . . ." *SRAMs Remand*

38. Further, the record shows that COGEMA, the parent company of respondent, Eurodif, is a major world supplier of natural uranium for the production of LEU.

Determination, at 3. Unlike the case in SRAMs in which the foundry was prohibited from selling the finished wafer, the enrichers in this case are not prohibited from selling the undelivered LEU to other customers. Given these facts, the foundry in SRAMs may hold temporary title to the finished wafer, but because it is not free to sell the finished product, it does not appear to hold ownership in that product. By contrast, in this case, the enrichers retain ownership in the undelivered LEU.

In examining the totality of the circumstances in this case, we find it relevant that the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU. Moreover, the transaction by which the utility obtains the LEU constitutes a "sale of merchandise" under relevant Federal Circuit court decisions. As such, this is a relevant sale in that it is the transaction by which the merchandise enters the United States market.

Finally, under the circumstances of this case, we believe the transactions at issue are also relevant sales because the enrichment process is a significant portion of the value of the subject merchandise such that the pricing behavior of the foreign enrichers is relevant to the issue of whether the LEU is being sold at less than fair value. Based upon all of the above, we find that, under the facts and circumstances of this case, the sales

at issue are relevant for purposes of determining the price of the subject merchandise and its normal value.[39]

(iii) *The Role of Utility Companies in the Production of LEU*

The Court found that the designation by the utilities of particular assays for the LEU and for uranium tails was analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan*, and to Akai's control of the specifications in *Certain Forged Stainless Steel Flanges from India* where the Department found these companies to be producers of subject merchandise. For LEU, the Court found that the designation of quantities and assays is bassd on (1) the design of the core reactor, which determines the level of U235 needed by that reactor, and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *Id.* at 24-25. The Court stated that the utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays. *Id.* at 25. Citing *SRAMs from Taiwan* and *Certain Forged Stainless Steel Flanges from India*, the Court stated that "Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer." *Id.* The Court noted that like the producer in *Certain Forged Stainless Steel Flanges*

39. We also note that, for the reasons set out at pages 86-88, below, in connection with the discussion of the applicability of the countervailing duty statute, that SWU transactions do not constitute the sale of a "service" under the ordinary meaning of that term or under other statutes addressing trade in services.

from India, the utilities control the specifications of the final product, even though, as in past determinations by the Department, "the actual processes of creating the product are left within the control of the tollers." *Id.* at 28-29.

In re-examining the above cases, we find the facts and circumstances to be very different from the case of LEU. In each of the cases cited by the Court, the tollee sold the subject merchandise, as contemplated by the regulation. Second, in nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications. If it were to do so, the Department would be unable to distinguish between purchasers, who do little more than provide specifications, and producers themselves.

The above cases need to be viewed in light of the relevant facts and circumstances, taken as a whole. For example, in *Polyvinyl Alcohol from Taiwan*, DuPont not only provided product specifications to the processor, it produced the major input, VAM, and sold the subject merchandise to unaffiliated customers in the United States. In *Certain Forged Stainless Steel Flanges from India*, the producer, Akai, not only purchased and retained title to the raw materials, and determined the quantity, size and type of flanges to be produced, it also

performed processing on most of the flanges, and, moreover, it sold the subject merchandise to unaffiliated customers in the United States. 58 FR at 68856. In *SRAMs from Taiwan*, the U.S. design house performed all of the research and development for the SRAM to be produced; it produced, or, at a minimum, arranged and paid for the production of, the design mask. *SRAMs Remand Determination*, at 3. In every instance the U.S. design house created the design that went into the SRAM wafer. The design did not equate to the provision of product specifications; rather, as the Department reasoned, "in an industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id.* at 5, (finding "no substantive difference" between the product design and development phase of production, equating design to a physical input).[40] Finally, in every instance, the U.S. design house sold the subject merchandise to unaffiliated customers in the United States. We find that in all of the cases, the respondent selected by the Department engaged in more than the purchase of the input and the provision of product specifications.

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40. By contrast, the product specification for LEU is not a proprietary design of the utility, whether the LEU is acquired under a SWU or an EUP contract. Further, LEU of a given assay is fungible with any other LEU of the same assay, can be delivered to any utility desiring such assay, and can be procured from any enricher under SWU or EUP contracts. Thus, the [missing text in original]

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With respect to whether the producer must engage in manufacturing or processing to be considered a producer, the Court found unpersuasive the Department's reasoning that the utility companies have no production facilities for the purpose of manufacturing subject merchandise. Citing *SRAMs from Taiwan*, *Certain Pasta from Italy*, and *Certain Forged Stainless Steel Flanges from India*, the Court noted that in prior determinations the Department found entities to be producers who did not maintain manufacturing facilities, but that this did not prohibit the application of the tolling regulation. *Id.* at 29.

Engaging in manufacturing operations is not a requirement under the regulation. In *Polyvinyl Alcohol from Taiwan*. however, the Department noted that the tolling regulation "only addresses the circumstances in which a toller will be considered a producer of the subject merchandise. Therefore, the Department is not restricted to the factors set forth in that regulation when determining whether a party other than a toller is the producer of merchandise under consideration," 63 FR at 32814. The Department went on to recognize the importance of engaging in production activities, noting that "while examining the production activities of a party may not be decisive in every case, whether a party has engaged either directly or indirectly in some aspect of the production of subject merchandise is an important consideration." *Id.* Importantly, in *Polyvinyl Alcohol from Taiwan*, DuPont produced the major input, VAM, that was sent to Chang Chun for processing into polyvinyl alcohol. *Polyvinyl Alcohol from Taiwan*, 63 FR at 32817. In that same case, the Department

rejected Perry's claim that it was a producer, based in part on the conclusion that the new tolling arrangement "merely reordered the contractual relationship between the parties, but had no significant effect on how they conducted business;" but also based upon the conclusion that "whether a party has engaged either directly or indirectly in some aspect of the production of the subject merchandise is an important consideration." *Id.* at 32814. Unlike DuPont, Perry did not engage, directly or indirectly, in any manufacturing operations. If Perry had done so, the new tolling arrangement would not have been a mere "reordering of the contractual relationship" because there would have been a significant change in how the company was conducting business. Accordingly, in that case, whether Perry engaged in manufacturing or production operations was relevant to the determination of whether Perry had ceased to be a purchaser and reseller, and had become the producer of the subject merchandise, as contemplated by the tolling regulation.

Where an examination of the totality of the circumstances is warranted in order to determine the producer of the subject merchandise, the performance of manufacturing or processing operations may take on added importance, as it did in the case of Perry in *Polyvinyl Alcohol from Taiwan*. In examining the functions performed by the tollee in *SRAMs from Taiwan*, for example, the Department found that "the design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask." *SRAMs Remand Determination*, at 3. The Department reasoned, *inter alia*, that "in an

industry that is shaped by intellectual property considerations . . . the design is one of the primary determinants of the value of individual products." *Id.* at 5. Thus, the U.S. design house produces the intellectual property that is one of the main components of value in the SRAM.

In the case of LEU, the facts and circumstances, taken as a whole, are significantly different from the above cases where the tollee was selected as the producer of the subject merchandise under the tolling regulation. In LEU, the utility companies make no sales of subject merchandise; nor do they engage in any manufacturing or processing operations related to production of the subject merchandise. Rather, the facts in this case indicate that utility companies are industrial users of the subject merchandise. And, as the utility companies themselves contend, they consume the subject merchandise. *Final French AD Determination*, 66 FR at 65879. As such, a finding that these companies are also producers of the subject merchandise would be at odds with the ordinary meaning of the term producer as one "who produces a commodity. Opp. to *consumer*." *See The New Shorter Oxford English Dictionary*, (1993 ed.), at 2367 (emphasis in original). To interpret the term "producer" in this context as encompassing industrial users and consumers of the subject merchandise would yield absurd results, and would be fundamentally in conflict with the legislative purpose of the statutory provisions to establish the price of subject merchandise and its normal value.

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Finally, with respect to the issue of control over the production of LEU, we find that the enrichment companies direct and control the manufacturing operations for the production of LEU sold pursuant to SWU contracts to the same extent they direct and control the production of LEU sold pursuant to EUP contracts. As such, the provision of product specifications by the utility customer does not, by itself establish a basis for the Department to fmd that utility companies are producers of LEU.

Unlike EUP contracts, an enrichment or SWU contract allows the customer to select the "transactional tails assay." By designating the transactional tails assay, the utility makes the decision of (1) the amount of natural feed uranium it must provide to the enricher in any given transaction; and (2) the amount of SWU to be paid for by the customer. In other words, the "transactional tails assay," a term that is well-known in the industry, allows a customer to optimize the amount of money and the amount of uranium it must provide for the LEU it will receive, based upon the commercial considerations of the customer. Their decision is based upon the commercial price of SWU and the commercial price of feed uranium.

By contrast, the transactional tails assay does not determine either the amount of natural uranium actually used by the enricher, nor the amount of energy actually expended by the enricher in producing the LEU under the contract. Rather, enrichers make business decisions as to whether they will overfeed or underfeed (*i.e.*, use

more feed uranium and less energy, or vice versa). These decisions are wholly within the decision-making of the enricher, and are based upon different commercial considerations than those faced by the utility customer.

In our view, the terms of the SWU contracts specify a transactional tails assay because this assay establishes the price for the quantity of LEU to be delivered. The contract terms, however, do not specify how the enricher is to produce the LEU. To the contrary, it is common practice in the industry for the enricher to determine how much feed to use and how much energy to expend in producing the required amount of LEU at the specified assay.[41]

To illustrate the point, enrichers do not run their enrichment facilities at different levels of feed input and energy input based upon whose feed is entering the production process or based upon whose LEU is being produced under a particular contract. Only the enricher makes these types of production decisions. This is further demonstrated by the fact that enrichers can, and frequently do, provide LEU under SWU contracts from LEU that has already been delivered to fabricators and that is listed as the enrichers' inventory on the books and records of the fabricator (*i.e.*, book transfers).

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41. Similarly, the notice provision in the SWU contracts also does not establish how the enricher is to produce the LEU under the contract. The purpose of the notice provision is to allow the utility company to determine how much feed material or how much money she will provide in any given transaction, as discussed above.

Indeed, book transfers are prevalent in the industry because LEU is largely a fungible product.

In sum, while a utility customer may select a "transactional tails assay" from a range of assays offered by the enricher and such a selection will determine the amount of SWUs the customer will have to pay for and the amount of uranium the customer must deliver to the enricher, it is the "operating tails assay" established by the enricher that determines the amount of energy and feed uranium that the enricher will actually use in its production of LEU. Accordingly, we find that enrichers have complete control over the enrichment process and control the amount of uranium and energy actually used in producing the LEU that is ultimately delivered to the customer. In addition, while the utilities direct the timing of when they want LEU delivered, the utility does not control the timing of when the LEU that is ultimately delivered is produced by the enricher or delivered by the enricher to the fabricator.

Finally, apart from our determination that the enrichers are the producers of the subject merchandise, the facts in this case also indicate that the enrichers are the "exporters" of the subject merchandise, as referenced under section 771(28) of the Act, and under sections 772(a) and (b) for purposes of export and constructed export price, and for normal value as well under section 771(28). Accordingly, the foreign enrichers as exporters of the subject merchandise separately qualify as respondents under the circumstances of this case.

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Conclusion on Producer or Exporter For Purposes of U.S. Price and Normal Value

Because enrichers make relevant sales that can be used to establish the U.S. price of subject merchandise and its normal value, engage in and control all aspects of enrichment processing, a necessary and significant manufacturing operation for the production of LEU, we find that, taken together, the facts and circumstances in this case indicates that the enrichers are the producers of LEU for purposes of establishing the U.S. price of the subject merchandise and its normal value. By contrast, because the utility companies do not sell LEU, but instead are consumers and industrial users of such merchandise, engage in no manufacturing operations of any kind related to the production of LEU, nor control the production of LEU, we find that, taken together, the facts and circumstances of this case indicate that utility companies are not the producers of LEU for purposes of establishing the U.S. price of subject merchandise and its normal value.

Comments From Urenco/Eurodif and AHUG

Urenco/Eurodif assert that unlike in the industry support section of the determination, where the Department analyzes the statutory requirements in close detail, in the antidumping duty portion of the Draft Remand Determination, the Department runs from the statute as if it were the plague. They argue that the statute is the centerpiece of this case, as it is the driver of the Department's entire tolling practice, including its tolling regulation.

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The respondents argue that, as the USEC Court described in detail, the Department has explicitly stated in its prior tolling determinations that the statute requires the Department to focus on a sale that captures all of the essential components of the subject merchandise. Urenco/Eurodif point out that, as the Court made clear, the Department recognized in *Polyvinyl Alcohol from Taiwan* that "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." Urenco/Eurodif further contend that the Court also noted that the Department has uniformly taken the same position in every case since the adoption of its toiling regulation. In short, as the Court explained, "Commerce has recognized that where the price paid for the subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law."

Given the foregoing, Urenco/Eurodif state that the Department's assertion that the statute is "silent as to how the Department is to calculate the price of the subject merchandise," where the tollee does not sell the merchandise, and its claim that "once the merchandise enters the commerce of the United States, the Department must then determine the appropriate basis for establishing the price of the subject merchandise and its normal value," are nothing short of disingenuous. Urenco/Eurodif contend that far from the principled

decision-making sought by the Court, the Draft Remand Determination seeks stubbornly to justify the Department's final determination by relying on a theory that has already been rejected by the Court as a justification for the treatment of SWU contracts as sales of subject merchandise and the recitation of differences that do not distinguish its tolling jurisprudence. In doing so, the respondents assert, the Department evades the essential point: how the Department should implement the principle behind its tolling practice, which is the statute's requirement that a sale of subject merchandise must capture all "essential components" of the price. These parties state that "[a]s the USEC Court recognized, because the sale of enrichment services does not capture the cost or price of the uranium input – a substantial portion of the value of the LEU – the Department cannot treat the sale of enrichment services as a cognizable sale under the law."

Urenco/Eurodif further point out in particular that the Department's attempt to distinguish its prior tolling cases as irrelevant because they involved the choice of respondent, not the scope of the antidumping duty law, contradicts the USEC Court's directive to consider that the fundamental principles underlying the tolling regulation cannot be confined to the choice of respondent. Urenco/Eurodif point out that, "as the USEC Court has noted the requirement that there be a sale of subject merchandise applies not only to the choice of the producer, but also to the determination of the basis of the export price used to calculate dumping margins." Urenco/Eurodif state that regardless of the context, the

statutory requirements mandate that the relevant sale under the antidumping duty law be made by "the company that is in a position . . . to sell at less than fair value in or to the U.S. market," USEC Inc., Slip Op. 03-34 at 15 n.9. Therefore, Urenco/Eurodif contend, the sale of the enricher's "subcontractor's services" cannot be equated to the sale of the subject merchandise, LEU.

Urenco/Eurodif also assert that the Department reinvents history by claiming that in the prior cases it merely "stated its preference to select the respondent whose price covers the full cost of production (*i.e.*, the full value of the subject merchandise)." Urenco/Eurodif contend that, as the Department explicitly recognized at the time, its determination was not an administrative "preference," but rather was required as a matter of law because, as noted above, the "statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise."

Moreover, Urenco/Eurodif contend that the Department's remand determination in *SRAMs from Taiwan*, which the Department now tries to offer in support of its argument, in fact explains why a processor cannot properly be chosen as a respondent: "because a subcontractor does not sell 'subject merchandise,' but rather only sells services and/or inputs, the export (or constructed export) price cannot be derived from the subcontractor's sales. Urenco/Eurodif assert that there is no principled basis for the Department to claim here

that it can "derive" the price of the subject merchandise where it previously said that such an approach was forbidden.

AHUG has separately addressed these same issues in its comments. AHUG first contends that the Department has not established that sales of enrichment services constitute relevant sales. Specifically, AHUG argues that the Department has failed to provide legitimate factual and legal bases for not applying the tolling regulation and its own precedents to the LEU investigations. AHUG divides its arguments into six main points.

First, AHUG asserts that the Department has no authority to disavow its tolling regulation when the Court has instructed it to reconsider the manner in which it applied the tolling regulation. Specifically, AHUG argues that the Department's assertion that in promulgating the tolling regulation, the Department only anticipated the situation in which the toller and tollee would make sales that could be construed as sales of subject merchandise and that the tolling regulation cannot be applied to the facts and circumstances of this case is not supported by the regulation nor its preamble. AHUG maintains that the regulation focuses on whether the toller owns the subject merchandise, controls its production, and makes the relevant sale and does not refer to the activities of the tollee. For these reasons, AHUG asserts that the Department lacks the authority to ignore the tolling regulation.

Moreover, AHUG argues that despite the Department's claim that *Polyvinyl Alcohol from Taiwan* provides justification for its position that the tolling regulation does not intend to address all facets of an analysis of tolling arrangements, the case does not provide a precedent for the Department's departure from the regulation. Instead, argues AHUG, the Court has already held that *Polyvinyl Alcohol from Taiwan* is not an applicable precedent because in this case the utility purchases the feedstock from a party unrelated to the enricher, and, therefore, the purchase of the feedstock confers no economic benefit on the enricher. AHUG maintains that the instant case involves a genuine tolling arrangement, unlike *Polyvinyl Alcohol from Taiwan*, and, therefore, *Polyvinyl Alcohol from Taiwan* is not applicable.

AHUG also argues that whether or not the enrichers engage in substantial manufacturing operations is irrelevant. AHUG states that it has explained why the Department's argument that the enrichers control the enrichment process is irrelevant under the tolling regulations in its letter from AHUG to Norman Y. Mineta Regarding Industry Support, December 19, 2000 at 8, AHUG Common Issues Brief at 17-18, and AHUG Opening Brief at 23.

Next, AHUG refutes the Department's assertion that the enrichers own, and hold title to, all the LEU they produce. AHUG maintains that the Court dismissed the Department's prior attempt to use *NSK v. United States*, 115 F.3d 965, 973 (Fed. Cir. 1997) ("*NSK*") as a

precedent, stating that it was inapplicable because "there is no finding that the enrichers' rights rise to the level of ownership . . .". AHUG asserts that the Court's remand recognized that (1) utilities have title to the uranium feed provided to enrichers; (2) enrichers may not sell a utility's feed to a third party; and (3) title to the feed remains with the utilities until the moment it is replaced by title to the delivered LEU.

AHUG refutes the Department's ownership arguments, stating that, in fact, there is no moment in which enrichers own the LEU enriched under enrichment services contracts because the enrichers do not own the uranium feed they use to fulfill enrichment services contracts. That feed, argues AHUG, is held by the enricher as a bailee for its utility customers. Under enrichment services contracts, the simultaneous transfer of the LEU and feed results in the transfer of the enrichment service (for which the enricher is paid) and the feed component (which the customer owns), in the form of LEU from the enricher as owner of the service and bailee of the feed component. Therefore, argues AHUG, the enricher must deliver LEU deemed to have been produced with the specific quantity of feed delivered to it by the customer and does not have the right, as claimed by the Department, to sell the LEU to any buyer. In addition, AHUG contends that, as a legal matter, the Court has already found that the enrichment process will be performed on the uranium provided by the customer.

Regarding the fact that the input is fungible, AHUG maintains that the draft remand determination does not offer any further justification for departing from the Department's past practice in the treatment of fungible goods.

AHUG's next point is that the Department can base its determinations only on relevant sales, which must comprise all elements of the value of subject merchandise. AHUG rejects the Department's claim that because the SWU transaction represents the final step in the purchase of LEU, it is a relevant sale in that it is the transaction by which merchandise enters the United States market. AHUG also dismisses the Departments rejection of its own precedent in *SRAMs from Taiwan*. AHUG states that given that *SRAMs* was affirmed by the Court on the basis that it fulfilled a statutory requirement, AHUG disagrees that the Department has the discretion to treat as relevant sales transactions that do not reflect all elements of the LEU value.

Moreover, AHUG maintains that *NSK* cannot be used to justify departing from the requirements of the statute. In *NSK* the Federal Circuit ruled that the Department could not include free bearing samples provided by the respondent to U.S. customers in its calculations because there had been no sale of that subject merchandise. Therefore, AHUG argues that since there is no sale of LEU in enrichment services contracts, *NSK* supports AHUG's position that those contracts cannot be included in the calculations of export price or constructed export price. AHUG adds that in

the circumstances of the instant case, it does not matter that the enrichers are exporters since under enrichment services contracts there is not a sale of the subject merchandise at a price reflecting all elements of its value.

In its final point, AHUG argues that the Court has already made clear that the Department failed to focus on the critical distinction between EUP and SWU transactions, *i.e.*, what is purchased. AHUG declares that the Department nevertheless uses imaginary transactions to construct a price by assigning a specific monetary value to the natural uranium component and that it estimated the market value using the average price the enrichers charged their customers for natural uranium for LEU contracts. However, AHUG argues, in enrichment services transactions, the enrichers do not charge utilities for the uranium feed and enrichers do not know the value of the feed. Therefore, the values used by the Department are not equivalent to what was purchased, AHUG maintains, and ignore the distinction between enrichment (SWU) and LEU (EUP) transactions.

Department Position:

As an initial matter, we disagree with Urenco/Eurodif and AHUG's interpretations of the Court's decision and remand as expressed in their comments. As we noted in the body of this determination, the Court recognized that the circumstances in this case appear to resemble in large part the tolling arrangements in earlier determinations, and could not reconcile the

Department's prior distinctions involving tolling with the Department's statements in this case. The Court specifically cited the Department's own statements made in the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwan* but further noted that it is well-established that the Department is authorized to depart from its prior practice as long as the agency articulates a reasoned analysis which demonstrates that the departure is supported by substantial evidence and in accordance with law.

On the issue of the Department's conclusion that neither the statute nor the regulation on tolling contemplates the particular facts and circumstances in this case, we make several points. First, respondents and AHUG's argument concerning the statute and regulation seem to rest on the premise that the Department can only make determinations where precedents and agency practice have been previously established. Respondents have noted that the Department has cited no administrative cases to support its position. In cases of first impression, however, where past practice does not address the facts and circumstances of a case, the Department is required to exercise its authority and interpret the statute in the manner intended by Congress.

Moreover, respondents do not cite any language in the statutory provisions governing U.S. price and its normal value to indicate that the price of the subject merchandise cannot be derived from the subcontractor's sales in any instance. We specifically recognized above

that past tolling cases do not address the facts and circumstances in the instant case. In their comments, respondents rely on the Court's statements that have properly focused the Department back upon its own statements made in the context of *SRAMs from Taiwan* and *Polyvinyl Alcohol from Taiwan*. Respondents, however, make no statutory argument as to why the Department's statements in those cases should be considered the only reasonable interpretation of the statute. Instead, respondents assert that the Department has reinvented history by stating a preference to select the respondent whose price covers the full cost of production. Respondents insist it was not an administrative preference, but rather was required as a matter of law because, again using the Department's own words, "the statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." This is incorrect. In the original investigation in polyvinyl alcohol from Taiwan, as cited by the parties, for example, the Department's memorandum reflects a choice between four viable options presented to the decision-maker.[42] Not only does the memorandum reflect the Department's view that it was faced with a choice of respondents, but we note that none of the options included an exemption from the AD law for merchandise entering the commerce of the United States. *Id.* Further,

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42. *Memorandum From Team to Barbara R. Stafford, Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun*, (Aug. 8, 1995) at 5.

we note that if the Department were not faced with a choice of respondents, then it would have been required, as a matter of law, to treat Perry as a producer in the later administrative review in *Polyvinyl Alcohol from Taiwan*, based upon the contractual relationships, as discussed above.

More important, however, neither the tolling regulation nor the statute contemplate the circumstances of this case. In examining the statute and regulation, to the extent we stated that the AD law requires the sale of subject merchandise and not the sale of processing, the broad implication of those statements would mean that merchandise entering the commerce of the United States would be considered outside the parameters of the AD law. We recognize that the statute does not directly address this circumstance, and we reject the implication of those statements to the extent they may be interpreted to mean that the AD law does not apply to merchandise traded and entering the United States for consumption. In our view, the objective of the tolling regulation is to obtain the full price of the subject merchandise. We also recognize, however, that there can be cognizable sales without 100 percent of the value of the subject merchandise reflected in the relevant sale.

With respect to AHUG and respondents' arguments that the facts in this case are consistent with the facts in *NSK* where there was no price for the sale of samples, we find such reliance upon *NSK* to be misplaced. In that case, the Federal Circuit found that because the sample merchandise in question lacked consideration, no sale existed, and thus "they should not be included in

calculating United States price." *Id.* at 970. The Court held that a sale requires the transfer of ownership to an unrelated party for consideration. Unlike the case of *NSK*, in the case of LEU there are meaningful sales that can be used to calculate export and constructed export price, as discussed above. In light of the Federal Circuit decisions in *NSK* and *AK Steel*, we find the sales at issue to be relevant sales as the utility customer obtains LEU through a transaction in which ownership in the LEU is transferred for consideration.

AHUG and respondents also dispute the Department's finding as to the title and ownership of the LEU in question. The parties contend that the Court has already addressed this issue, and that the Department is attempting to evade the Court's holding on this issue. We disagree. The Court expressly stated why the Federal Circuit decisions in *NSK* and *AK Steel* were inapplicable, noting that "[a]s there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable." *USEC*, at 24, n. 12. In the *French Final Determination*, we examined the overall arrangement and did not address the ownership of the LEU and the transfer of ownership under *NSK*. The Department has now addressed this issue in the determination.[43]

43. We note that nothing in the statute prohibits the Department from combining separate transactions to obtain the U.S. price of the subject merchandise. In such a case, the activities of the producer and seller of the input and the activities of the processor may reasonably be considered together for purposes of establishing U.S. price, as such activities are tied together by the transactions to the U.S. customer, as it relates to the entry of merchandise into the United States.

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As to AHUG's allegation of imaginary transactions of feed uranium that formed the partial basis of the price of LEU, we disagree with AHUG's argument. As noted above, the Department seeks to obtain the full value of the subject merchandise. The Department specifically requested data from the respondents as to the value of the uranium feed. The Department has used the entry value of the feed as an estimate of the value of this component in order to obtain the value of the LEU at issue. This approach is consistent with the statute and fully comports with the Department's practice where specific information or data are unavailable.

Finally, with respect to AHUG and respondents' argument that whether enrichers control the enrichment process is irrelevant, we disagree. While we recognize, as stated above, that the relevance of the manufacturing operations is limited, we note that AHUG has attempted to view in isolation the factors used by the Department in making its determination that utility companies are not producers of LEU. As we stated above, the facts taken together indicate that the utility companies are not producers of LEU. Utility companies do not sell LEU, as contemplated by the tolling regulation, but instead are consumers and industrial users of such merchandise; they engage in no manufacturing operations of any kind related to the production of LEU, and do not control the production of LEU. The Department's determination is based upon these factors, taken together. While we recognize that a tollee is not required to engage in manufacturing operations directly, or to have facilities for such manufacturing, we also

recognize that where a company does not engage in any traditional manufacturing functions, and does not sell the subject merchandise, but rather acts in the capacity of a consumer of such merchandise, the entity is not satisfying any important functions either in the traditional sense or consistent with the purpose of the Department's tolling regulation – to calculate U.S. price of the subject merchandise and its normal value. Accordingly, if the Department were to treat U.S. utility companies as foreign producers, the purpose of the regulation would be defeated, and relevant sales would escape examination where such transactions may place the industry at risk from unfairly traded imports.

Urenco/Eurodif raise additional points. However, these points have been fully addressed in the body of this determination, and need not be repeated here.

C. APPLICABILITY OF THE COUNTERVAILING DUTY STATUTE

a. *The Department's Analysis of Countervailing Duties*

In the final affirmative countervailing duty determinations, the Department addressed the general scope of the countervailing duty law, and in particular the specific program in the case of France in which the Department found that the Government of France provided a countervailable subsidy by purchasing goods for more than adequate remuneration, under section 771(5)(E)(iv) of the Act.

For the general scope issue, the Department stated that "in conducting countervailing duty investigations, section 701(a)(1) of the Act requires the Department to impose duties if, *inter alia*, 'the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a chass or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States.' We believe the statute is clear that, where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports." *Final French AD Determination*, at 65879.

For the program specific analysis of the purchase of a good for more than adequate remuneration with respect to LEU from France, the Department stated that "[b]ecause we have detennined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods." *Id.* at 65883, n. 7.

b. *The Court's Remand on the Countervailing Duty Investigation*

In addressing the Department's determination as to the general applicability of the countervailing duty law, the Court noted that the Department relied on the same rationale it employed in applying the antidumping duty law that because the LEU was entering the United States for consumption, the merchandise was subject to the law.

With respect to the specific program pertaining to "more than adequate remuneration" under section 771(5)(D)(iv) of the Act, the Court, noting that the Department had relied on the same analysis as in the antidumping context concerning the SWU contracts involving the purchase of LEU, stated:

> We have already determined that Commerce's determination regarding "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU.

Id. at 41. On remand, the Court stated, the Department will have an opportunity to reconsider the application of its tolling regulation to the transactions at issue here. The Court instructed the Department that it "must reconsider its countervailing duty determinations in that context." *Id.*

c. *Analysis of the Countervailing Duty Determinations*

(1) *General Applicability of CVD Law*

With respect to the general applicability of the countervailing duty (CVD) statute, we find that the law is applicable to the LEU entering the United States pursuant to SWU contracts. First, based upon the our analysis on remand in the antidumping context,

pertaining to sales made under the SWU contracts between foreign enrichers and U.S. utilities, we found that the enrichers own and hold title to the complete LEU product subject to these investigations, and transfer ownership and title to the utility customers for consideration. Based upon that analysis, these sales are also relevant for purposes of the CVD law.

Second, we also find that, unlike the antidumping law, where the statute refers to a class or kind of merchandise being sold at the less than fair value, the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States. Section 701(a)(1) requires the Department to impose countervailing duties upon the merchandise if it determines that "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailing subsidy with respect to the manufacture, production, or export of a class or kind of merchandise *imported, or sold (or likely to be sold) for importation,* into the United States." 19 U.S.C. § 1671(a)(1) (emphasis added).

Prior to the enactment of the Trade and Tariff Act of 1984 (1984 Act), section 701(a)(1) did not contain specific language pertaining to merchandise "sold (or likely to be sold) for importation." The legislative history of the 1984 Act indicates that Congress amended the provision to include sales of merchandise not yet

imported into the United States.[44] Based upon the language of the provision and the legislative history, we believe the law was amended, not for purposes of narrowing the scope of its application, but rather to broaden its application to include not only imports of subject merchandise, but also sales of such merchandise that occurred for importation. Accordingly, we interpret the CVD law to apply whenever a foreign goverment provides subsidies with respect to a class or kind of merchandise that is imported into the United States. In the case of LEU, there is no dispute that the merchandise at issue was imported into the United States. Accordingly, we conclude that the law is applicable to all imports of LEU from the respective countries under investigation.

Finally, because the tolling regulation was adopted for the limited purpose of providing guidance on the selection of the relevant sale for purposes of determining U.S. price and normal value under the AD law, it is not relevant for purposes of determining whether particular imports am subject to the CVD law. If a subsidy has been provided with respect to the production or importation

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44. Trade and Tariff Act of 1984, 98th Cong., 2d Sess., 98-39, at 26. *See also* Conf. Rept., 98-1156, at 75 and 165-66. The legislative history states that the change "is intended to eliminate uncertainties about the authority of the Department of Commerce and the ITC to initiate countervailing duty cases and to render determinations in situations where actual importation has not yet occurred but a sale for importation has been completed or is imminent." H.R. Re. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N 4910, 5137.

of subject merchandise, countervailing duties may be imposed regardless of the characterization of the transaction (sale of goods or sale of services) pursuant to which such imports are made or the identity of the producer (toller or tollee) for purposes of the tolling regulation under the AD law. Accordingly, all of the subsidy programs which formed the basis for the calculation of the net subsidy rate in the CVD investigations on LEU from Germany, the Netherlands, and the United Kingdom, and the subsidy relating to the exoneration/reimbursement of taxes in the CVD investigation on LEU from France, would be unaffected by any determination as to whether enrichment transactions involve the sale of goods or services. For the reasons discussed below, we also conclude that the specific program in the French CVD investigation concerning the adequacy of remuneration involves a "financial contribution" within the meaning of section 771(5)(D) without regard to how SWU transactions are characterized for other purposes.

(2) *Program Specific Analysis*

With respect to the specific subsidy program in the French LEU case concerning the adequacy of remuneration, section 771(5)(D) lists financial contributions subject to the law as the following:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.

19 U.S.C. § 1677(5)(D).

Section 771(5)(E)(iv) states that a benefit is conferred. "in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." 19 U.S.C. § 1677(5)(E)(iv). Thus, the statute establishes that a countervailable subsidy exists where a government provides goods or services for less than adequate remuneration, but limits the application to goods, as compared to services, where a government makes a purchase for more than adequate remuneration. The legislative history does not explain the basis for the limitation to goods where the government makes a purchase under subsection 771(5)(D)(iv). We believe the provision is aimed at the producers of merchandise who obtain a benefit by selling their merchandise to the government for more than adequate remuneration.

In this case, we find that EdF purchased a good, LEU, for more than adequate remuneration. For the

same reasons that the SWU contracts involve the sale of merchandise in the antidumping context, we find that they involve the purchase of merchandise with respect to section 771(5)(D)(iv) of the Act.

We note that even if the transactions between EdF and Eurodif were not sales of merchandise, nonetheless, for two reasons EdF's payments of more than adequate remuneration to Eurodif were made in connection with EdF's "purchasing goods" as that term is used in section 77I(5)(D)(iv). First, there is no question that EdF obtains LEU in a series of purchase transactions (*i.e.*, the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment). Accordingly, EdF's payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is "purchasing goods."

Second, in our view, the fundamental purpose of the provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context. The term "service" is not defined in the statute. Under its ordinary meaning, consistent with the purpose of section 771(5)(D), we interpret the term to mean "[t]he sector of the economy that supplies the

needs of the consumer but produces no tangible goods, as banking and tourism."[45] *The New Shorter Oxford English Dictionary*, 1993 ed., at 2789. This definition is also consistent with the U.S. government's negotiating position as to the distinction between goods and services in the international trade context. Section 2114(b)(5) of Title 19 of the U.S. Code, addressing international trade in services, states that the term "services" in this context means "economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, postal and delivery services, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design and engineering, management consulting, real estate, professional services, entertainment, education, health care, and tourism."

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45. *The New Shorter Oxford English Dictionary* defines the term for economic purposes as "The sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism." (1993 ed.), at 2789. That source also indicates that a service is "The provision or system of supplying necessary utilities, such as gas, water, or electricity, to the public; the apparatus of pipes, wiring, etc., by which this is done." Also "Expert advice or assistance given by a manufacturer or dealer to a customer after the sale of goods; the provision of the necessary installation, maintenance, or repair work to ensure the efficient running of machine etc.; a periodic routine inspection and maintenance of a motor vehicle etc." The ordinary meaning of the term indicates that a manufacturing operation producing a tangible good does not constitute a service within the meaning of the term. In this case, no party disputes the underlying fact that LEU is a tangible product resulting from the enrichment process.

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These definitions are relevant and useful for purposes of distinguishing between purchase transactions pertaining to goods and those pertaining to services. If a transaction is made that is directly related to the purchase of a good, such as the purchase of the manufacturing or processing component, for more than adequate remuneration, we interpret section 771(5)(D) to be applicable to the transaction, as explained further below.

In the case of LEU, even if, contrary to our finding above, the sales between EdF and Eurodif were solely for contract manufacturing, and were not found to be a transfer of ownership in the complete LEU, section 771(5)(D)(iv) of the Act would continue to be applicable to this circumstance because enrichment is a manufacturing operation leading to the production of a good. In this context, enrichment is not a service, but is instead a critical component of the LEU, just as any manufactured product has within it a manufacturing component. Moreover, one cannot purchase LEU without purchasing the enrichment component. Thus, the sales of enrichment are directly related to the purchase of LEU. Where such sales are made at more than adequate remuneration, the sales directly benefit the manufacturing operations leading to the production of LEU. Therefore, we believe the transactions at issue embody the very types of subsidies the law was intended to address under section 771(5)(D)(iv) of the Act.

However, even if the subsidy in the French CVD investigation were characterized as the purchase at more

than adequate remuneration of the "service" of producing the LEU, rather than the purchase of the LEU itself, the Department must look beyond the characterization to effectively administer the law. A payment of more than adequate remuneration to a producer of an acquired product may constitute a countervailable subsidy under section 771(5)(D) provided there is a nexus between the purchase transaction and the product acquired.

For example, where a foreign government purchases a good from a manufacturer, but separately purchases freight services from a company unaffiliated with the manufacturer, the statute does not contemplate the imposition of a countervailing duty on the provision of freight for more than adequate remuneration because any benefit provided to the freight provider by the government pertains to the purchase of a service, and does not benefit the production of merchandise.

If, on the other hand, the manufacturer of the merchandise provided both the merchandise and the freight service, but pursuant to separate transactions, the Department would need to examine closely the arrangement between the manufacturer and the foreign government. If the facts indicated that, on its face, the good appeared to be purchased at adequate remuneration, but that the remuneration for the freight service far exceeded the value of the service, the Department may reasonably infer that the remuneration pertaining to freight is so excessive that, as a practical matter, it is reasonably related to the purchase of the

merchandise (*i.e.*, a good that falls within the ambit of the provision). In such a case, the Department could reasonably conclude that the foreign government in this instance has provided a subsidy to the manufacturer in connection with the purchase of goods for more than adequate remuneration.

While the above example is not directly relevant to the facts and circumstances of the French CVD investigation, the example is useful in that it recognizes that countervailable subsidies may occur by a payment of more than adequate remuneration to a producer of goods for an activity provided by the producer in connection with the production and delivery of such goods. In the case of LEU, the purchase transactions are more directly related to the purchase of goods, as discussed above, than in the above example.

Comments From Urenco/Eurodif and AHUG

Ureneo/Enrodif argue that the Department offers two justifications for its finding that the CVD law is applicable to LEU entering the United States pursuant to SWU contracts: first, that the enrichment sale transaction is relevant "for purposes of the CVD law," and, second, that the CVD law is applicable to any merchandise imported into the United States. Urenco/ Eurodif assert that neither of these justifications supports the application of the CVD law to enrichment transactions.

Urenco/Eurodif first contend that their discussion in the AD context as to why an enrichment transaction is not a sale of merchandise applies equally to the Department's first justification in this context; and that no further discussion in the CVD context is necessary. As for the second justification, Urenco/Eurodif assert that the Department's finding flatly ignores the statutory requirement that countervailable subsidies be provided "with respect to the manufacture, production or export of a class or kind of merchandise." They argue that the fact that LEU is imported into the United States says nothing about whether the subsidies found by the Department are with respect to the manufacture or production of LEU. Since, as shown above and throughout this proceeding, the respondents are engaged in rendering enrichment services, they assert that any subsidies supporting this activity cannot properly be treated as having been bestowed with respect to the manufacture of LEU.

Urenco/Eurodif further point out that just as the antidumping duty statute is quintessentially concerned with evaluating sales of merchandise to determine whether there has been unfair price discrimination, the CVD law is concerned with whether countervailable subsidies have benefited the manufacture or production of merchandise. Correspondingly, just as the antidumping duty law can be applied only to the sale of merchandise, these parties assert that the CVD law can be applied only to the subsidization of the manufacture or production of merchandise. Respondents point out that the Department does not refer to any case where

the CVD law has been applied to the subsidization of a service, or where the reach of the CVD law has exceeded the reach of the antidumping law. Respondents conclude that there is no justification for the Department's finding that the CVD law is applicable to enrichment services transactions.

With regard to the French-specific program, respondents contend that since the Department's analysis in the antidumping context is completely flawed, it falls equally as hard when incorporated by reference here. Respondents contend there is no validity to the Department's alternative statement that "even if the sales between EdF and Eurodif do not involve sales of merchandise," there nonetheless can exist a countervvailable subsidy because "under these transactions EdF has acquired the LEU in purchase transactions in connection with the purchase of goods." Respondents contend that the Department's claim is faulty. The phrase "in connection with" does not appear in the statute, and the utility company is not purchasing goods. Respondents state that enrichment transactions involve the purchase of services. Accordingly, respondents point out, the Department inaccurately claims that the dictionary and section 2114b(5) of an unrelated portion of Title 19 establish that a true service is one that results in "no tangible goods." Respondents argue that the attempted analogy does not work. Since the customer already owns the uranium at the start of the transaction, it is not contracting for the purchase of a "tangible good," but rather only separative work, which clearly is an "intangible." In addition, section 2114b(5)

explicitly states that "construction" (which certainly results in the delivery of tangible goods) is included within the definition of services, thereby demonstrating that the fact that the services result in the final delivery of something tangible is irrelevant.

AHUG has also addressed this issue. AHUG first argues that "the Department cannot justify its conclusion that manufacturing services are not services." AHUG states that in the draft remand determination, the Department relies upon definitions of "services" that are neither consistent with the term's ordinary meaning nor the documented position of the U.S. government and foreign governments in international trade negotiations.

According to AHUG, *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be rendered by one person to another. . . . [t]he act of serving the labor performed or the duties required. . . . [p]erformance of labor for the benefit of another, or at another's command. . . ." AHUG states that Webster's New Universal Unabridged Dictionary includes in its definition of "service" "work done or duty performed for another or others." AHUG contends that neither of these definitions comports with the Department's suggestion that manufacturing services must be treated as sales of goods under the trade remedy law. AHUG points out that both of its definitions encompass the provision of enrichment services.

AHUG also states that it previously established, contrary to the Department's argument, that the U.S.

government considers uranium enrichment to be a service in the context of the General Agreement on Trade in Services (GATS) negotiations. In a submission to the WTO, the U.S. government defined energy services specifically to be "those services involved in the exploration, development, extraction, *production*, generation, transportation, transmission, distribution, marketing, consumption, management, and efficiency *of* energy, *energy products and fuels*." Further, AHUG contends the United Nations Central Product Classification (CPC), which the WTO members have adopted for the purpose of identifying service sectors covered by the GATS, includes energy-related services with "Manufacturing Services" (Division 88). Specifically, AHUG claims, Division 88 includes the "Manufacture of coke, refined petroleum products and *nuclear fuel, on a fee or contract basis*." According to AHUG, the explanatory notes to Division 88 provide that "Manufacturing Services" are "[s]ervices rendered on a fee or contract basis by units mainly engaged in the production of transportable goods, and services typically related to the production of such goods, and that "services incidental to manufacturing" include "manufacturing on a fee or contract basis, i.e. manufacturing services rendered to others where the raw materials processed, treated or finished are not owned by the manufacturer . . ." According to AHUG, the fact that manufacturing services cover such activities on a contract basis, where the raw materials processed are not owned by the toller (such as with enrichment of feed owned by utilities), confirms that uranium enrichment is a service distinct from the sale of LEU under trade law.

AHUG further states that it has previously pointed out that a number of countries have included manufacturing services in their schedule of commitments in the GATS, for example, Austria, Canada, Iceland, South Africa, the Dominican Republic, Indonesia, Kuwait, Malaysia, Nicaragua, Panama, Gambia and Lesotho, all of whom have undertaken to permit trade in manufacturing services.

Department Position:

We disagree with respondents' and AHUG's arguments on the application of the CVD law in general and the program-specific subsidy pertaining to the purchase of goods in the French CVD case.

AHUG argues that the Department "cannot justify its conclusion that manufacturing services are not services." AHUG challenges the Department's interpretation as being neither consistent with the ordinary meaning of the term nor the documented position of the U.S. government and foreign governments in international trade negotiations. *AHUG Comments*, at 18. AHUG points out that *Black's Law Dictionary* defines "service" within the context of contracts to be "[d]uty or labor to be rendered by one person to another . . . [t]he act of serving the labor performed or the duties required . . . [p]erformance of labor for the benefit of another, or at another's command . . ." *Id.* (citing *Black's Law Dictionary*, 6th ed. at 1368 (1990).

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The broad definition offered by AHUG would, if applied, turn the production of goods into a series of services composed of labor or work performed. As such, it does not provide a basis to distinguish between goods and services for purposes of the AD and CVD laws, or to distinguish between the General Agreement on Trade in Services (GATS) and the AD and CVD regimes established under the GATT and now within the WTO. In defining the term "services," *Black's Law Dictionary* states at the outset that "[t]he term has a variety of meanings, depending upon the context or the sense in which it is used." 5th Ed., at 1227. AHUG has cited to the contracts context. Under this definition, however, the international regimes established for the imposition of antidumping and countervailing duties would be subject to the terms and conditions specified in the parties' contracts. This is not a circumvention issue as much as it is an issue of form over substance. In this case, the respondents and AHUG agree that where LEU is sold pursuant to EUP contracts, any subsidies pertaining to the manufacture of the LEU are subsidies that pertain to the manufacture of goods. However, where the same subsidies pertain to the same manufacture of LEU that is sold pursuant to SWU contracts, AHUG and respondents propose that the subsidy no longer pertains to the manufacture of goods, but instead to services. Under such an interpretation, the contract alone would establish the parameters of the AD and CVD laws.

To administer these laws effectively and consistent with the intent of Congress, we recognize that where a purchaser obtains foreign goods, or where a government

obtains goods, the aim of the law to address unfairly traded imports, or to address subsidies pertaining to the purchase of goods for more than adequate remuneration. The object and purpose of these laws would be defeated if the Department were to adopt broad definitions of the term "services" in the context of the trade laws.

Second, the Department's definition reflects the position of the United States government with respect to its international obligations under the GATS. To be clear, the United States has made no commitment with respect to treating enrichment processing as a service within the meaning of the GATS. Nor has the United States made any commitment to treat LEU produced under contract manufacturing as an activity that is beyond the scope of the AD and CVD laws.

In making its arguments that enrichment processing is a service that falls within the ambit of the GATS, AHUG incorrectly assumes that the Provisional Central Product Classification of the United Nations (CPC) is controlling with respect to the commitments of the United States under the GATS. To the contrary, Article I of the GATS defines the services under GATS, not the CPC.[46]

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46. *See* General Agreement on Trade in Services. Further, the purpose of the CPC was to "provide a framework for international comparison of statistics dealing with goods, services and assets . . ." CPC at 5. The CPC itself recognizes that its function of providing such a framework for comparison of statistics does not extend to distinguishing goods from services. The CPC states that "[t]he

(Cont'd)

Appendix G

Contrary to AHUG's presumption, the authoritative document relied upon by the WTO in its negotiations is a note from the Secretariat dated July 10, 1991, MTN.GNS/W/120. That document lists the services sectoral classifications. Under section 884 and 885, the document specifically lists "[s]ervices incidental to manufacturing." *Id.* at 4. Enrichment of uranium is not listed. Moreover, the United States considers enrichment of uranium to be no more "incidental to manufacturing" than any other manufacturing activity that produces such merchandise as textiles, microchips, or steel.

To interpret the GATS as AHUG has proffered would mean that many manufacturing operations that produce merchandise currently subject to the AD and CVD would, sua sponte, be outside the purview of the AD and CVD law based upon its listing in the CPC. For example, the same CPC lists "manufacture of textiles" and "manufacture of basic metals" – manufacturing operations that produce textiles and steel. *See* Provisional CPC, at 149-150. Pub. Doc. 85, Exhibit 1, at Fr. 30-31. Nothing in the AD and CVD laws, nor the GATS, supports a such a sweeping conclusion that anything listed in the CPC would be outside the scope of the unfair trade laws.

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precise distinction between goods and services is interesting from a theoretical point of view and may be relevant for the compilation and analysis of certain economic statistics. However, there is no need to embody such a distinction into a classification such as the CPC, which is intended to be for general purpose and to cover both goods and services." *Id.* at 9. Thus, the CPC may be used as a starting point in negotiations, but the listing of services contained in the CPC does not represent an authoritative expression of the United States' commitments under the GATS.

In addition, we note that the U.S. government document relied upon by AHUG (*i.e.*, a communication on energy services), dated December 18, 2000, was one of many proposals presented by the U.S. government in its negotiations on GATS. AHUG's Submission, Apr. 5, 2001, at Exhibit 3. As a proposal, the document demonstrates that there is no commitment currently in place, nor was there any commitment in place at the time period in which the agency conducted its AD and CVD investigations on LEU. Second, the document expressly states that the proposal is a "Draft - For Discussion Purposes Only" and that it is "intended to stimulate discussion." Exhibit 3, at Annex A, and Communication From The United States, at 1. The document also states that [t]his exercise does not prejudge the questions of whether all possible energy service activities are listed or which of these activities fall within the scope of the GATS." *Id.* at Annex A. Thus, AHUG's continued reliance upon it as a reflection of the United States commitments under GATS is misplaced. As a final point, AHUG notes that other countries have included manufacturing services in their schedule of commitments under the GATS, and notes, in particular, that Canada has scheduled commitments for "toll refining services." However, commitments by other countries neither reflect the commitments of the United States, nor bind the United States to such commitments.

Finally, with respect to Urenco/Eurodif's argument that the Department does not refer to any case where the reach of the CVD law has exceeded the reach of the AD law or where the CVD law has been applied to the subsidization of a service, we need to clarify that the CVD law does not exceed the reach of the AD law. In the draft

determination, we stated that, unlike the AD law, "the scope of the CVD law is clearer in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation."

Based upon all of the above reasons and the analysis set forth in the body of this remand determination, we continue to find that the CVD law (and the AD Law) is applicable to the LEU at issue, and that the provision of subsidies through the French government's purchase of LEU for more than adequate remuneration is subject to the CVD law.

Final Remand Determination

This final redetermination is pursuant to the remand order of the Court of International Trade in *USEC Inc. and United States Enrichment Corporation v. United States*, Court Nos. 02-00112, 02-00113, 02-00114, and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233, Slip Op. 03-34, (March 25, 2003).

s/ Joseph A. Spetrini
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

6-23-03
Date

APPENDIX H — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED SEPTEMBER 16, 2003

UNITED STATES COURT OF INTERNATIONAL TRADE

Court Nos. 02-00112, 02-00113, 02-00114, 02-00219, 02-00221, 02-00227, 02-00229, 02-00233

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

September 16, 2003, Decided

Before: POGUE, WALLACH, and EATON, Judges.

OPINION BY: Pogue

Appendix H

OPINION

Pogue, Judge: In *USEC Inc. v. United States*, 27 CIT __, 259 F.Supp.2d 1310 (2003) (*"USEC I"*),[1] this Court remanded aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom.[2] The Court instructed Commerce to evaluate the applicability of its tolling regulation, 19 C.F.R. § 351.401(h), to determine whether the intervenors (the "utilities," also the "Ad Hoc

1. Familiarity with the Court's prior opinion is presumed.

2. The determinations challenged in the original action were *Low Enriched Uranium from France*, 67 Fed.Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) (*"LEU from France"*); *Low Enriched Uranium from France*, 67 Fed.Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed.Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

Utilities Group" or "AHUG") should be designated as producers of LEU. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1326. The Court further directed that if Commerce found the tolling regulation applicable, the agency should also (1) reconsider whether application of the regulation affects the determination as to which companies are "producers" for the purpose of the industry support determination, *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328; and (2) reconsider its application of the countervailing duty laws. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1329. The Court now reviews the results of the remand as presented in Commerce's *Final Remand Determination, USEC Inc. and United States Enrichment Corporation v. United States* (June 23, 2003) ("Remand Determ."). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

Background

The antidumping and countervailing duty investigations at issue here covered all low enriched uranium. Low enriched uranium is used to produce nuclear fuel rods, which in turn produce electricity in nuclear reactors. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314. Uranium enrichment is one of five steps in the production of nuclear fuel.[3] *See id. LEU from*

3. The steps involved in nuclear fuel production are: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium (U_{308}); (3) converting the natural uranium into uranium hexafluoride (Cont'd)

France, 66 Fed.Reg. at 65,879. At issue in this proceeding is whether, for purposes of application of the antidumping and countervailing duty statutes, the "separative work unit" contracts entered into by the utilities and the companies that enrich the uranium feedstock (the "enrichers") constitute subcontracting arrangements involving the purchase of services or sales of enriched uranium.

As we more fully explained in *USEC I*, nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. *See LEU from France*, 66 Fed.Reg. at 65,878, 65,884. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of Dep't of Commerce Hearing in the Matter of Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom (Oct. 31, 2001), Jt.App. Tab 6-A at 46 ("Hrg.Trans."). As noted in *USEC I*, all parties to this action agree that sales of enriched uranium product constitute sales of merchandise subject to the

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(UF_6), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314; *see also LEU from France*, 66 Fed.Reg. at 65,879.

antidumping and countervailing duty laws. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314.

The second type of contract is called a "separative work unit" or "SWU" contract. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. *See LEU from France*, 66 Fed.Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. *LEU from France*, 66 Fed.Reg. at 65,878, 65,884-85.

As discussed in *USEC I*, because feed uranium is fungible, the specific feed uranium provided by a utility need not be used to produce LEU for that utility. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315 (citing Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 16-17 & n.21). Enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership, and any uranium held by the enricher may be used to produce LEU for any customer. *Id.*

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. The

4. Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

utility retains title to feed uranium supplied to the enricher until the enricher delivers the LEU ordered by the utility. In addition, at the time of delivery of the LEU, the enricher recognizes that title to the LEU is also held by the utility. As stated in one of the contracts in the record, "[t]itle to the Feed Material shall remain with [the utility] until the [LEU] Delivery associated with such Feed Material . . . at which time the Feed Material shall be deemed to have been enriched; whereupon [the utility] sha[ll] have title to such [LEU] associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [Utility A] and Urenco, Jt.App. Tab 3-F at JA-1364; *see also* Uranium Toll Enrichment Services Contract between [Utility B] and COGEMA, Inc., Jt.App. Tab 3-A at JA-1210; Uranium Enrichment Services Contract between [Utility C] and COGEMA, Inc., Jt.App. Tab 3-E at JA-1302; Uranium Enrichment Services Contract between [Utility D] and Urenco, Jt.App. Tab 3-G at JA-1399. In *USEC I*, we described the SWU transactions as follows:

> Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the enricher upon delivery of the feed uranium to the enricher. However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. Nor does the enricher have the power to sell a utility's feedstock to a third party. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the

> enricher, the utility has title to and ownership of the LEU. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5]

USEC I, 27 CIT at __, 259 F.Supp.2d at 1315 (internal citations omitted).

In reaching its original affirmative antidumping and countervailing duty determinations, Commerce found that under both LEU and SWU contracts the enrichers were producers of LEU for purposes of the less-than-fair-value determination.[6] The agency concluded that

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5. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315-16 n. 5 (noting that (1) the foreign enrichers' records, which were verified by Commerce, did not reflect payments for customer-provided uranium, (2) USEC requires utilities to pay the property taxes on customer-provided uranium in USEC's possession, and (3) the record does not indicate that the enrichers treated customer-provided uranium as an asset).

6. To determine whether merchandise is being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represents the price of the good when sold in or for export to the United States. *See* 19 U.S.C. § 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In making an export price or constructed export price determination, Commerce first must decide which company is the producer or exporter of the merchandise. *See* 19 U.S.C. § 1677a(a)-(b); *Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT __, __, 143 F.Supp.2d 958, 966 (2001).

EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed.Reg. at 65,884-85.

In *USEC I*, this Court concluded that the circumstances of the SWU transactions at issue resemble those of earlier cases involving "tolling" or "subcontracting" arrangements in which Commerce applied its tolling regulation, 19 C.F.R. § 351.401(h), to determine that the tollee, rather than the toll manufacturer, or subcontractor, was the producer of the subject merchandise. The Court therefore directed Commerce to assess the applicability of the tolling regulation, and thus, the propriety of designating the enrichers as producers of LEU and respondents in the antidumping and countervailing duty investigations. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1326, 1331. The Court also directed Commerce to explain why it applied a different definition of the term "producer" in the context of determining industry support than that used in the context of calculating the dumping margin. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328.

In its Remand Determination, Commerce concludes once again that the enrichers, rather than the utilities, are the producers of LEU, finding that (1) "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value," (2) the enrichers "are the only companies engaged in the production of LEU," (3) the enrichers "control the

production of LEU," and (4) the utilities are "industrial users and consumers of LEU." Remand Determ. at 52. Commerce also explained that the different definitions of the term "producer" are warranted by the purposes underlying the relevant statutory provisions. *Id.* at 14-15, 22-23, 25.

Standard of Review

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Ownership of the Subject Merchandise

Commerce bases its selection of the enrichers as the producers of LEU primarily on its conclusion that under the terms of the contracts, the enrichers own all of the LEU that they have produced but not yet delivered. *See* Remand Determ. at 52, 59. Commerce asserts that the enrichers transfer title to and ownership of the LEU to the utilities upon delivery of the LEU. *Id.* Therefore, Commerce argues, the delivery of the LEU effects a transfer of title and ownership for consideration, which constitutes a sale under *NSK Ltd. v. United States*, 115 F.3d 965, 973 (Fed.Cir.1997), and a relevant sale for the purposes of calculating a dumping margin. *Id.* at 59-60.

As we discussed in *USEC I*, however, the SWU contracts governing the transactions at issue establish a legal fiction that the very feed uranium delivered by a utility to an enricher is enriched and then returned as LEU to the utility. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321-22; Oral Arg. Trans. at 33-34, 38, 41. The Court concluded that although the enrichers obtain the right to use and possess the feedstock, and assume the risk of loss or damage, there is no evidence that they ever obtain ownership of either the feed uranium or the final enriched product. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1315, 1323; *see also* Oral Arg. Trans. at 30-35, 38, 41. Moreover, the contractual provisions addressing the retention of title in the feed uranium and passage of title in the LEU suggest an intention to establish a continuous chain of ownership in the utility while maintaining the enricher's ability to cover its obligations under the contract should it encounter difficulties in producing or providing LEU for a customer. *See, e.g.*, Oral Arg. Trans. at 33-34 (noting that the contractual provisions specifying that a utility obtains title to LEU are necessary because "if title to the product material were not specified clearly in the contract, there could be a question"), 38 ("[The enricher] receives material that it is holding for the account of the Utility customer, to be enriched and returned. And, when it is returned in enriched form, title passes to the enriched product. Title is extinguished in the feed."); Uranium Enrichment Services Contract between Cogema, Inc. and [Utility E], App. to Response of USEC to Dep't of Commerce's Remand Determ. of June 23, 2003, Tab 1 at JA-9003 ("USEC Remand App.");

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Uranium Enrichment Services Contract between [a utility] and Urenco, USEC Remand App. Tab 2 at JA-9074; *see also* contracts cited *supra* pp. 1337-1338. For example, these provisions enable the utility to claim the amount of feed uranium delivered, or the value thereof, from the enricher in the event that the enricher breached the contract. Such a contractual arrangement, which is apparently beneficial to both parties, is aided by the essential fungibility of the material at issue. Parsing the contractual provisions at issue does not lead to the conclusion that the enricher obtains ownership over the LEU and then sells it to the utility. Rather, the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed.

Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise under *NSK Ltd. v. United States.* (*See* 115 F.3d 965, 975 (Fed.Cir.1997) (concluding that a sale "requires both a transfer of ownership to an unrelated party and consideration"). Nothing in Commerce's Remand Determination provides any evidentiary or legal basis for a contrary conclusion. Commerce's basic premise in the Remand Determination is that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." Remand Determ. at 52. This statement, however, begs the question whether these transactions

can truly be construed as relevant sales of merchandise. Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

Commerce's subsidiary factual determination is no more well-founded. Commerce asserts that because the utilities only hold title to the feedstock at the time prior to delivery, "the enricher, by contrast, would have rights as to the LEU." Remand Determ. at 58. Commerce, however, cannot and does not provide any evidentiary basis for this supposition; nothing in the record supports a determination that the enricher has any ownership rights. Accordingly, Commerce's determination is unsupported by substantial evidence and not in accordance with law.

II. Equivalence of EUP and SWU Contracts

In addition to its claim that the enrichers obtain ownership of the LEU, Commerce also bases its conclusions upon the assertion that EUP and SWU contracts are fundamentally equivalent. Commerce states that

> the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU

> by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU.

Remand Determ. at 61.

Commerce made essentially the same argument in its original determinations when it stated that "the overall arrangement under both [EUP and SWU] contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France*, 66 Fed.Reg. at 65,884. This Court dismissed that argument in *USEC I* when we stated that "under any tolling arrangement, the 'overall arrangement' is one for acquisition of a good, usually manufactured by the toller." *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1324. Furthermore, the SWU transaction does not account for the full value of the finished product; rather, it accounts only for the value of the enrichment processing. *Cf. Response to Court Remand, Taiwan Semiconductor Mfg. Co. v. United States*, Jt.App. Tab 7-A at JA-2604 (Dep't Commerce June 30, 2000) ("Under the Department's practice, the 'relevant sale' must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion, and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production. . . . In contrast, a subcontractor's or toller's price does not represent all elements of value. Rather, the subcontractor or toller merely performs one or more segments of the manufacturing process at the

direction of another entity. Thus, subcontracted production is distinguishable from other types of production because the subcontractor does not bear at least one element of cost which is essential to production of the subject merchandise.") (*"SRAMS Remand Response"*). Here, the SWU transaction represents approximately 65 percent of the value of the LEU, and is not equivalent to a sale of the finished product at its full value. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1325 (indicating that natural uranium supplies "approximately 35 percent of enriched uranium's total value").

Commerce states in a footnote that "in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher." Remand Determ. at 54 n. 34. Yet this reasoning could be applied to any subcontracting case, including some of Commerce's earlier tolling cases, in which a tollee provides raw materials to the toll manufacturer and pays for the manufacturing services. For example, in *SRAMS from Taiwan*, the value of the wafer design and design mask provided by the design house plus the value of the manufacturing processes performed by the toller, considered together, reflect the full value of the finished product. In that case, however, Commerce recognized that the toller was paid only for the actual manufacturing processes, and that "a subcontractor's or toller's price does not represent all elements of value." *SRAMS*

Remand Response, Jt.App. Tab 7-A at JA-2603-04. In *Certain Pasta from Italy*, Corex provided the materials to the toller and paid the toller for its manufacturing services. 63 Fed.Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review). The payment to the toller was characterized as a "processing fee," and Commerce determined that Corex, rather than the toller, was the producer of the subject merchandise. *Id.* Commerce has stated that "[t]ypically, the subcontracting, or tolling, addressed by [the tolling regulation] involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." *SRAMS Remand Response*, Jt.App. Tab 7-A at JA-2604. Consequently, we find unpersuasive Commerce's argument that the transaction between the tollee and toll manufacturer reflects the full value of the merchandise produced.[7]

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7. Commerce also cites to *Polyvinyl Alcohol from Taiwan* for the proposition that "the sale of subject merchandise may occur in two distinct transactions," and "such relevant sales may be combined to derive, and calculate, the price of the subject merchandise." Remand Determ. at 55-56 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. 32,810, 32,81[3-14] (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review)). The transactions in *Polyvinyl Alcohol from Taiwan* to which this comment refers are those between Perry and Chang Chun. Commerce determined that Chang Chun, the toller, was the producer of the subject merchandise and that the other company, Perry, was merely an importer and reseller. *See Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. 6,526,

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6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review). Perry had restructured its contractual arrangement with Chang Chun after Commerce found that Chang Chun was selling subject merchandise at less than fair value. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1320-21 n. 11 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527). Under the restructured contract, Perry purchased inputs from an affiliate of Chang Chun and arranged delivery of the inputs to Chang Chun for processing. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321 n. 11 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527). As we stated in *USEC I*, "[t]he crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties." *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1321 n. 11. By contrast, in considering DuPont's relationship with Chang Chun in the same case, Commerce held that DuPont was the producer of the subject merchandise because DuPont manufactured the primary input, shipped it to Taiwan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1320 (citing *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527).

The instant case is more similar to the contract between DuPont and Chang Chun than to the contract between Perry and Chang Chun. First, in the course of managing the sequential steps in the production of nuclear fuel, the utility purchases uranium feedstock from a third party and pays the enricher to process it into LEU. *See, e.g., USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314-15. Second, the utility does not merely import and resell LEU. Finally, the contractual arrangement here long

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III. The Tolling Regulation, 19 C.F.R. § 351.401(h)

In the Remand Determination, Commerce again concludes that the tolling regulation does not apply in this case to designate the utilities as producers of LEU for purposes of calculating export price or constructed export price. *See* Remand Determ. at 47, 52. As in its original determinations, Commerce concludes that the enrichers are the producers of LEU. *Id.* at 45, 52, 56-57.

In explaining its decision, Commerce reasons that the tolling regulation "does not purport to address all aspects of an analysis of tolling arrangements," and that the agency looks at the totality of the circumstances in making its determination. Remand Determ. at 49 (quoting *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813). Commerce distinguishes the prior tolling cases cited by the Court in *USEC I* on the grounds that in each of those cases, the agency "faced a choice of respondents, based upon its analysis of the sales made by two entities—the toller on the one hand, and the tollee on the other." Remand Determ. at 48. Commerce argues that in each of the earlier cases,

> the tollee sold the subject merchandise, as contemplated by the regulation. Second, in

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predates the initiation of unfair trade investigations. *See, e.g.*, Hrg. Trans., Jt.App. Tab 6-A at 43-45; Oral Arg. Trans, at 42. Unlike the contract referred to in the Remand Determination, the SWU contracts here are not simply restructured purchase contracts.

> nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications.

Remand Determ. at 62-63. The agency says that in this case, by contrast, the tollees did not sell the completed merchandise. As the utilities made no sales of the subject merchandise, Commerce claims that they cannot be designated as respondents for the purpose of establishing export price or constructed export price. Therefore, Commerce concludes, "the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is designed to implement." Remand Determ. at 47. Commerce asserts that the tolling regulation does not contemplate the circumstances of this case, and that "the statutory provisions governing the establishment of U.S. price are silent" as to how to calculate U.S. price in such circumstances. *Id.* at 51; *see also id.* at 47 ("A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. . . . In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject merchandise.").

Commerce thus proceeds to evaluate "the totality of the circumstances in order to select the appropriate respondents." Remand Determ. at 50.

It is certainly true that the tolling regulation does not "address all aspects of an analysis of tolling arrangements," Remand Determ. at 49 (quoting *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813), and that the agency may look at the totality of the circumstances in making a determination. *See, e.g.*, *Stainless Steel Bar from India*, 66 Fed.Reg. 13,496, 13,496 (Dep't Commerce Mar. 6, 2001) (preliminary results of new shipper antidumping duty administrative review) ("In determining whether a company that uses a subcontractor in a tolling arrangement is a producer pursuant to 19 C.F.R. [§] 351.401(h), we examine all relevant facts surrounding a tolling agreement."); *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,813 ("[W]hen determining whether a party is a producer or manufacturer of subject merchandise, we look at the totality of the circumstances presented."). Nonetheless, we find Commerce's continuing attempts to distinguish its earlier tolling cases from the instant case unpersuasive.

In support of its assertions, Commerce relies primarily on *SRAMS from Taiwan* and *Polyvinyl Alcohol from Taiwan*, in which the tollees participated in manufacturing or processing operations. *See SRAMS Remand Response*, Jt.App. Tab 7-A at JA-2603, JA-2605 (finding that the tollee design house engaged in research and development, thereby producing the intellectual

property that was "one of the primary determinants of the value of individual products"); *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 6,527; *Polyvinyl Alcohol from Taiwan*, 63 Fed.Reg. at 32,817 (concluding that DuPont was the producer of the subject merchandise, because it manufactured the primary input and shipped it to a toller for further manufacturing).

In a number of other cases, however, it appears that the tollee did not engage in manufacturing or processing operations, and was determined to be a producer based on procurement and continued ownership of inputs or raw materials, payment of processing fees to subcontractors for manufacturing, and overall control of the series of processes (such as purchasing inputs, procuring manufacturing services, and marketing and sales services) involved in creating the final product. In *Certain Pasta from Italy*, Commerce determined that Corex was the producer of the subject pasta because Corex "(1) purchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product." *See* 63 Fed.Reg. at 53,642. Corex also was "solely responsible for the marketing and sales of the product and any freight arrangements." *Id.* Corex's involvement in the production of the subject merchandise apparently involved not manufacturing or processing, but managing the successive steps in production of the subject merchandise by procuring and maintaining ownership of the material inputs and subcontracting the manufacturing processes. In *Certain Forged Stainless Steel Flanges from India*, Commerce found respondent

Akai the producer of the subject merchandise, even though Akai did not own the machinery used in producing flanges and apparently did not engage in the actual manufacturing processes 58 Fed.Reg. 68,853, 68,855-56 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value). Instead, Commerce's conclusion was premised on the following facts:

> Akai purchase[d] and maintain[ed] title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges, and . . . direct[ed] and control[led] the manufacturing process insofar as it determine[d] the quantity, size, and type of flanges to be produced. . . . Akai control[led] the costs for all elements incorporated in the production of the flanges.

Id. at 68,856. In explaining its conclusion, Commerce stated that "[t]he Department is required to capture all the costs involved in the production of the subject merchandise, and must therefore look to the company that controls the costs of production of the merchandise." *Id.; see also* Dep't of Commerce Mem. from Joseph A. Spetrini to Troy Cribb, *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Stainless Steel Butt-Weld Pipe Fittings from Italy* at 3 (Dec. 27, 2000) (unpublished), *at www.ia.ita.doc.gov/frn/index.html* (concluding that a company that "perform[ed] all marketing and selling functions," "purchased the raw

material," and "maintained ownership of all materials sent . . . for further production" was the producer of subject merchandise, while the two companies that actually performed manufacturing operations were tollers and not producers); *Stainless Steel Bar from India*, 65 Fed.Reg. 59,173, 59,174 (Dep't Commerce Oct. 4, 2000) (preliminary results of new shipper antidumping duty administrative review) (finding a company the producer of the subject merchandise where it "(1) [p]urchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product").

In other cases, it appears that the tollee did engage in manufacturing or processing operations, but this fact was not crucial to Commerce's determination that the tollee was the producer. *See, e.g.*, Dep't of Commerce Mem. from Joseph A. Spetrini to Faryar Shirzad, *Issues and Decision Memorandum for the Administrative Review of Certain Stainless Steel Wire Rod from India for the Period of Review ("POR") Covering December 1, 1999 through November 30, 2000* at 5 (May 29, 2002) (unpublished), *at www.ia.ita.doc.gov/frn/index.html* ("[T]he sub-contractor is not the producer of the wire rod, because the companies of the [tollee] Viraj Group retain ownership of the material and control the sale of the subject merchandise; therefore, [the Viraj companies] are producers of subject merchandise."). As we stated in *USEC I*, " 'Commerce's construction of "producer," as memorialized in [the regulation], emphasizes three factors: (1) ownership of the subject

merchandise; (2) control of the relevant sale . . .; and (3) control of production of the subject merchandise.' " *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1318 (quoting *Taiwan Semiconductor Mfg. Co. v. United States*, 25 CIT at __, 143 F.Supp.2d at 966).

In the production of LEU, the utilities manage the successive processes in the production of nuclear fuel, using contractors that perform mining and milling of uranium, conversion of uranium into uranium hexafluoride, enrichment of uranium hexafluoride to obtain LEU, and fabrication of nuclear fuel rods. *See, e.g.*, *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314, 1322. The utilities manage the entire process of creating nuclear fuel in order to manage costs and assure a steady and reliable supply of fuel. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1316; Oral Arg. Trans. at 47, 53-54. Enrichment is merely one step in this process, and the utilities obtain it by providing a raw material to a subcontractor and paying for the service of enrichment. As discussed in *USEC I*, the utilities' management of the process of producing nuclear fuel and their relationship with the enrichers under SWU contracts render this case very similar to the tolling arrangements seen in earlier cases. Consequently, the fact that the utilities do not subsequently sell the finished product, but rather consume it in the production of electricity, does not render the tolling regulation inapplicable. Moreover, as noted in section I, *supra*, nothing in the record provides a basis for determining that the tolling arrangements at issue here constitute sales that may be considered equivalent to the full-value sale of a finished

product. Accordingly, Commerce's determination that its tolling regulation is inapplicable to this case is neither supported by substantial evidence nor in accordance with law.

IV. Definitions of "Producer" in the Contexts of Industry Support and the Determination of Export Price or Constructed Export Price

In *USEC I*, the Court directed Commerce to assess whether the definition of "producer" in the industry support context should differ from the definition applied in the context of determining export price or constructed export price. *See USEC I*, 27 CIT at __, 259 F.Supp.2d at 1328. In addition, the Court directed that "[i]f Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination." *Id.*

In its Remand Determination, Commerce concludes that in order to qualify as the producer of a good for the purposes of industry support, a company must have a "stake" in the domestic industry, which the agency interpreted to mean that a company must be engaged in the "actual production of the domestic like product" in the United States. Remand Determ. at 13 (quoting S.Rep. No. 96-249 at 47 (1979)), 15-16. Commerce reasoned that "[w]hether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands

to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product." *Id.* at 14. Commerce further reasoned that the tolling regulation is inapplicable in the industry support context because its application could lead to the inclusion of companies within the domestic industry that would not be adversely affected by unfairly traded imports of merchandise. *See* Remand Determ. at 16. Commerce claims that such an outcome would defeat the purpose of the unfair trade laws, which exist to aid domestic producers adversely affected by unfair trade. *See id.* at 16-17; *see also Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed.Cir.1995) ("The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the **1346 foreign manufacturers charge for the same products in their home markets."); *Tung Mung Dev. Co. v. United States*, 26 CIT __, __, 219 F.Supp.2d 1333, 1338-39 (2002).

In the context of the less than fair value determination, Commerce maintains that the purpose and intent of the statute warrants application of a different definition of "producer" than is used in the industry support context. Commerce explains that 19 U.S.C. §§ 1677a and 1677b focus on the price of a good, rather than on its manufacture. Remand Determ. at 22-23. Section 1677a refers to the "producer or exporter" of a good in connection with selecting an appropriate respondent and sale price. *Id.* at 22; 19 U.S.C. § 1677a(a)-

(b). Commerce explains that in this context, it may be appropriate to select a toller as the producer when that company, although it may not actually manufacture the good, is responsible for setting the price "at which the merchandise is first sold (or agreed to be sold) before the date of importation." 19 U.S.C. § 1677a(a)-(b); Remand Determ. at 23-24 & n.21.

Absent application of the tolling regulation to the industry support context, Commerce again concludes, as it did in the original determinations, that USEC is the sole domestic producer of LEU. Remand Determ. at 18-20. The agency concludes that for purposes of the industry support determination, the utilities are industrial users and purchasers of LEU, rather than producers, because they do not actually produce LEU in the United States and they do not maintain any manufacturing operations or facilities for the production of LEU. *Id.* at 19-20 (noting also that the "business interest" of the utilities, "like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down"). Consequently, as Commerce concludes that USEC is the sole domestic producer of LEU, the agency finds that the petitions had support within the domestic industry as required by 19 U.S.C. § 1673a(c)(4). *See id.*

In explaining why it applies the tolling regulation in establishing export or constructed export price, but not in the industry support determination, Commerce has articulated reasons that are consistent with the purposes of the two sections of the statute. In accordance with

Commerce's reasoning, we acknowledge that in this case, the utilities would benefit from, rather than be injured by, the availability of lower-priced LEU or enrichment services provided by foreign companies. Consequently, the Court finds Commerce's application of different definitions of "producer" in these two contexts is reasonable and therefore in accordance with law. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed.Cir.2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). As the Court upholds Commerce's reasons for declining to apply the tolling regulation in the industry support context, we also uphold the agency's finding that USEC is the sole member of the domestic industry for the purposes of satisfying the industry support requirement and permitting the investigation to proceed. *See* 19 U.S.C. §§ 1673a(b)(1), 1673a(c)(4)(A).

V. Applicability of the Countervailing Duty Statute

Title 19 U.S.C. § 1671 provides that Commerce may impose countervailing duties where it determines that a government or public entity within a country is providing a countervailable subsidy[8] "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for

8. A "countervailable subsidy" is a "financial contribution" or "any form of income or price support" that confers a benefit. 19 U.S.C. § 1677(5).

importation, into the United States," and imports of that merchandise injure or threaten to injure a domestic industry.[9] In its Remand Determination, as in its original

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9. 19 U.S.C. § 1671(a) states that

If —

(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that-

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

(Cont'd)

determinations, Commerce concludes that the countervailing duty provisions are applicable to both EUP purchase contracts and SWU enrichment contracts.

In the Remand Determination, Commerce notes that "the scope of the CVD law is clearer [than the scope of the antidumping law] in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States." Remand Determ. at 84. The agency "interpret[s] the CVD law to apply whenever a foreign government provides subsidies with respect to a class or kind of merchandise that is imported into the United States," and states that "[a]ccordingly, we

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> then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671(a). "Subsidies Agreement country" is defined in 19 U.S.C. § 1671(b) to mean countries that are WTO members or as to which the United States has undertaken certain obligations. In the case of non-Subsidies Agreement countries, no determination of injury or threat of injury to the domestic industry is required. 19 U.S.C. § 1671(c). France, Germany, the Netherlands, and the United Kingdom are Subsidies Agreement countries. *See* Membership of the World Trade Organization, WTO Doc. No. 95-2450, WT/L/51/Rev.4 (Aug. 18, 1995), at *http://docsonline.wto.org;* Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1144 (1994) (providing that multilateral agreements included in Annex 1, which includes the Subsidies Agreement, are binding on all WTO members).

conclude that the law is applicable to all imports of LEU from the respective countries under investigation." *Id.* at 85.[10]

The language of the countervailing duty provisions states that duties may be imposed where (1) merchandise is imported and (2) a countervailable subsidy has been provided "with respect to the manufacture, production, or export" of that merchandise. 19 U.S.C. § 1671(a)(1). Thus, no sale of the subject merchandise is required for the application of the countervailing duty statute. Moreover, in the countervailing duty context, the enricher may be considered to "manufacture" or "produce" LEU by performing the processing operations that transform feed uranium into enriched uranium.[11] *See, e.g., Oxford English Dictionary* at

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10. Commerce also states that "based up [its] analysis" that the enrichers "own and hold title to the complete LEU product . . . and transfer ownership and title to the utility customers for consideration . . . these [SWU contract] sales are also relevant for purposes of the CVD law." Remand Determ. at 83-84. As discussed above, we find incorrect Commerce's conclusion that pursuant to the SWU contracts the enrichers own and transfer ownership in the complete LEU. Consequently, contrary to its statement in the Remand Determination, Commerce's conclusion that SWU transactions are sales of subject merchandise cannot lend support to Commerce's countervailing duty finding. *See id.*

11. We concluded in section III, *supra*, that Commerce's tolling regulation applies in the antidumping context to designate the utilities as "producers" of LEU. That regulation, which is applicable in the context of determining export price or

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www.oed.com (defining the verbs "produce" as, *inter alia*, "[t]o bring forth, bring into being or existence .... [t]o bring (a thing) into existence from its raw materials or elements, or as the result of a process; to give rise to, bring about, effect, cause, make" (an action, condition, etc.) and "manufacture" as, *inter alia*, "[t]o make (a product, goods, etc.) *from, (out) of* raw material; to produce (goods) by physical labour, machinery, etc." and "[t]o make up or bring (raw material, ingredients, etc.) into a form suitable for use; to work up *as* or convert *into* a specified product") (emphasis supplied).

Consequently, we find Commerce's interpretation that the statutory countervailing duty provisions are applicable to imports of LEU under both EUP purchase contracts and SWU enrichment contracts reasonable.

There remains the question whether purchases of enrichment services for more than adequate remuneration may constitute countervailable subsidies. Title 19 U.S.C. § 1677(5)(E)(iv) provides that a subsidy which confers a benefit exists "in the case where goods or services are provided, if such goods or services are

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constructed export price in order to assess a dumping margin, does not apply in the countervailing duty context. Consequently, for purposes of the countervailing duty determination, the tolling regulation does not prohibit recognition of a subcontractor or toll manufacturer as a producer of a good. Thus, the tolling regulation does not contradict the conclusion that the enrichers are "producers" of LEU for purposes of a countervailing duty determination.

provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." Thus, while the statute explicitly provides a remedy for the provision of subsidies in the form of goods or services, it also explicitly limits purchases that may constitute subsidies to purchases of "goods." 19 U.S.C. § 1677(5)(E)(iv).

As in its original determinations, Commerce concludes in the Remand Determination that the state-owned French electric utility, EdF, purchased a good from and provided a subsidy to the French enricher Eurodif. *See* Remand Determ. at 86; *see also Low Enriched Uranium from France*, 66 Fed.Reg. 65,901, 65,902 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); Dep't of Commerce Mem. from Bernard T. Carreau to Faryar Shirzad, *Issues and Decision Memorandum: Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France—Calendar Year 1999* at 3-5 (Dec. 21, 2001) (unpublished), *at www.ia.ita.doc.gov/frn/index.html.* Commerce first bases this conclusion on its finding that SWU transactions constitute sales of LEU, because the enricher obtains ownership of the LEU and transfers ownership to the utility for consideration. *See* Remand Determ. at 86-87. As discussed above, the Court has found this conclusion incorrect. *See supra* pp. 11-12.

Commerce also states, however, that even if the SWU transactions do not constitute sales of merchandise,

Appendix H

EdF's purchase of enrichment from Eurodif still constitutes a countervailable subsidy. The agency argues that "[f]irst, there is no question that EdF obtains LEU in a series of purchase transactions (*i.e.*, the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment)." *Id.* at 87. Accordingly, Commerce argues, EdF's "payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is 'purchasing goods.'" *Id.* Second, Commerce argues that

> the fundamental purpose of the [countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context.

Remand Determ. at 87.

We find Commerce's first argument unpersuasive. We have found that the enrichment transaction here does not constitute a sale of subject merchandise, and the mere fact that enrichment is "purchased" as part of a series of transactions in the nuclear fuel production

process simply does not constitute a basis for concluding that the purchase of enrichment processing is tantamount to the purchase of a good. Moreover, it appears from the record that under SWU contracts, Eurodif performs only the enrichment portion of the nuclear fuel production process. Commerce stated in its preliminary countervailing duty determination that "[f]or purposes of this determination, we accept Eurodif's assertion that its operations are no different from those of USEC." *Low Enriched Uranium from France*, 66 Fed.Reg. 24,325, 24,327 (Dep't Commerce May 14, 2001) (notice of preliminary affirmative countervailing duty determination and alignment with final antidumping duty determination). If, under SWU contracts, Eurodif performs only the uranium enrichment, then EdF must contract with third parties for the other steps in the production of nuclear fuel, including procuring feed uranium and fabricating LEU into nuclear fuel rods. *See supra* note 3 (listing the five steps in the production of nuclear fuel). The fact that the utility contracts with third parties, rather than with the enricher, to complete four of the five steps in the nuclear fuel production process renders even less plausible the claim that enrichment is merely part of an overall goods transaction between the utility and enricher.

Commerce's second argument posits that operations resulting in or leading to the production of a good do not constitute "services" for the purpose of the countervailing duty statute. Remand Determ. at 87 ("[T]he sale of manufacturing or processing, which is a

necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a 'service' in this context."). The agency bases this conclusion on its understanding that "the fundamental purpose of the [statutory countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise." *Id.*

The countervailing duty provisions are "intended to offset any unfair competitive advantage enjoyed by foreign manufacturers or exporters over domestic producers as a result of subsidies." S.Rep. No. 103-412, at 88 (1994). To realize this legislative intent, Commerce interprets the countervailing duty statute to reach subsidies that help to defray the costs of manufacturing subject merchandise. Noting that the statute does not define "service," the agency distinguishes manufacturing services, or operations that result in the production of a good, from other types of services which do not result in the production of a good. *See* Remand Determ. at 87-88 ("The term 'service' is not defined in the statute. Under its ordinary meaning, consistent with the purpose of [19 U.S.C. § 1677(5)(D)], we interpret the term to mean '[t]he sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism.' ") (internal citation omitted). Under this interpretation, the agency concludes that even transactions "solely for contract manufacturing" are covered by 19 U.S.C. § 1677(5)(D), because the

manufacturing operations lead to the production of a good. Remand Determ. at 88. Essentially, Commerce states that because manufacturing operations are integral to the good produced, subsidization of those operations constitutes subsidization of the good itself. *See id.* at 89.

Commerce's distinction between manufacturing processes that lead to the production of subject merchandise and other services that do not produce tangible goods is consistent with the language and purpose of the countervailing duty statute. It is consistent with the statute's language because it preserves a real distinction between "goods" and "services." It is consistent with the statute's purpose because subsidization of a process essential to the manufacture of a good lowers the manufacturer's cost of producing that good, which may enable the manufacturer to gain a competitive advantage over an unsubsidized competitor.

In the case of enrichment processing, subsidization would lower an enricher's production costs, enabling the enricher to sell enrichment processing at lower prices than an unsubsidized enricher. This is the type of "unfair competitive advantage" the statute is intended to counter, and therefore, Commerce's interpretation of the statute is reasonable and in accordance with law.

Consequently, we affirm Commerce's determination that purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy.

Conclusion

In summary, we find Commerce's explanation of its industry support determination is in accordance with law, and we sustain this portion of the Remand Determination. We also sustain Commerce's determination that the countervailing duty law may apply to imports of LEU under either LEU purchase contracts or SWU enrichment contracts, as well as the agency's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy. Because this opinion is limited to general issues, *see* Scheduling Order at 4-5 (Aug. 5, 2002), we do not decide here the question whether the LEU imported from the subject countries benefitted from countervailable subsidies.

We also find Commerce's determinations that LEU and SWU contracts are equivalent and that the antidumping provisions are applicable to SWU transactions are neither supported by substantial evidence nor in accordance with law. Accordingly, with respect to these conclusions, we find that Commerce's Remand Determination is unlawful and we reverse.

Appendix H

The parties are ordered to consult with each other and with the Clerk of the Court and to file a revised scheduling order within sixty days of the date of entry of this opinion.

APPENDIX I — OPINION AND ORDER OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED DECEMBER 22, 2003

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 03-170

Court No. 02-00112; and Court Nos. 02-00113, 02-00114, and Consol. Court Nos. 02-00219; 02-00221, 02-00227, 02-00229, and 02-00233

USEC INC. and UNITED STATES ENRICHMENT CORPORATION,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Decided: December 22, 2003

[Motions for permission for interlocutory appeal pursuant to 28 U.S.C. § 1292(d) granted.]

Before: Pogue, Wallach, and Eaton, Judges

Appendix I

Opinion and Order

Pogue, Judge: In two prior opinions, this Court decided four issues that critically affect the future of this litigation. The parties now seek permission for an immediate interlocutory appeal of the Court's decisions. *See* 28 U.S.C. § 1292(d) (2000). For the following reasons, we will grant the parties' requests.

Background

The Court's two prior opinions in this matter arose from fifteen actions, consolidated under nine[1] court numbers, all challenging aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom[2] or the related

1. Only eight of those court numbers are contained in the heading of this order. Court Nos. 02-00220 and 02-00236, consolidated as Court No. 02-00220, involve specific issues which await resolution of the "general" issues presented here for certification. *See* Scheduling Order (Aug. 2, 2002); *see also infra* n.3.

2. The determinations challenged in the original actions were *Low Enriched Uranium from France*, 67 Fed.Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final

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final injury determination of the International Trade Commission ("ITC").[3] This Court remanded aspects of the Department's determinations in *USEC Inc. v. United States*, 27 CIT __, 259 F.Supp.2d 1310 (2003) ("*USEC I*").[4] In *USEC Inc. v. United States*, 27 CIT __, 281

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determination of sales at less than fair value) ("*LEU from France*"); *Low Enriched Uranium from France*, 67 Fed.Reg. 6,689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France*, 66 Fed.Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom*, 66 Fed.Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

3. *Low Enriched Uranium From France, Germany, the Netherlands, and the United Kingdom*, 67 Fed.Reg. 6,050 (ITC Feb. 8, 2002). The parties' challenges to the ITC's determinations are consolidated as Court No. 02-00220.

4. In the Court's original Scheduling Order for this matter, we decided, and the parties agreed, to address initially "general issues" affecting the Department's threshold determinations, to be followed later by issues which are not general, such as "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5 (Aug. 2, 2002). The cases in which these "general issues" were before the Court were assigned to the current panel. *See* USCIT R. 77(e)(2) ("An action

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F.Supp.2d 1334 (2003) ("*USEC II*"), the Court reviewed the remand results, affirming-in-part and reversing-in-part the Department's remand determination.[5]

No party requests a further remand of the general issues decided by the Court in *USEC I* and *USEC II*. Rather, the parties now seek a statement pursuant to 28 U.S.C. § 1292(d) permitting immediate appeal.[6]

(Cont'd)
may be assigned to a three-judge panel . . . when the chief judge finds that the action raises an issue . . . [that] has broad or significant implications in the administration or interpretation of the law."). Familiarity with the Court's prior opinions is presumed.

5. In reviewing the agency record in either an antidumping or countervailing duty case, "the [C]ourt [of International Trade] *shall hold unlawful* any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (emphasis added). *See also* 28 U.S.C. § 1585 ("The Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States."). Under these statutes, this Court has both the authority and the duty to make this final determination after remand. To hold otherwise would be both inconsistent with the statute and destructive of the need for finality in litigation before the Court. *Cf. Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379 (Fed.Cir.2003) (holding that the CIT abused its discretion by "interposing its own [factual] determinations" rather than remanding to the ITC for further fact-finding, where fact-finding was committed to the agency by statute).

6. In their motions, the parties do not entirely agree on the proposed statement of the issues for appeal. The United States states the issue as:
(Cont'd)

(Cont'd)

Whether the United States Department of Commerce's determination that the foreign enricher is the appropriate respondent, in antidumping duty proceedings, for determining export price and constructed export price of Low Enriched Uranium imported pursuant to enrichment transactions is supported by substantial evidence and otherwise in accordance with law.

Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1) at 3.

Plaintiffs and Defendant-Intervenors EURODIF S.A.Compagnie Generale Des Matieres Nucleaires and COGEMA, Inc. (collectively, "COGEMA"), USEC Inc. and the United States Enrichment Corporation (collectively, "USEC"), and Intervenor the Ad Hoc Utilities Group ("AHUG") state the issues as the Court's decisions on the general issues regarding:

1. The Department of Commerce's determination that the antidumping duty petitions and the countervailing duty petitions leading to the contested determinations were filed on behalf of the U.S. low enriched uranium ("LEU") industry;

2. The Department of Commerce's determination that the antidumping duty law is applicable to LEU delivered pursuant to enrichment transactions; and

3. The Department of Commerce's determination that the countervailing duty law is applicable to LEU delivered pursuant to enrichment transactions, and that a countervailable subsidy determination can be based on finding that prices paid pursuant to enrichment transactions have been for more than adequate remuneration. (Cont'd)

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

The Issues

In *USEC I* and *USEC II*, the Court determined that the key general issues decided by the Department in this matter involved the initial applicability of the Department's "tolling" regulation, 19 C.F.R. § 351.401(h).[7] Specifically, the Court decided the following four issues:

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COGEMA's, USEC's, and AHUG's Mot. Issuance Interlocutory Order at 2.

We attempt to resolve this disagreement by stating our view of the issues decided by the Court. *See infra* pp. 5-6.

In addition, the government's "Motion for a Statement Pursuant to 28 U.S.C. § 1292(d)(1)" contains a proposed order certifying a question for appeal. Def.'s Mot. Stat. Pursuant to 28 U.S.C. § 1292(d)(1). Conversely, the government, in replying to COGEMA's, USEC's, and AHUG's Motion also "request[s] that the Court decline to certify any issues for interlocutory appeal." Def.'s Resp. to Pl .'s Mot. Issuance Interlocutory Order at 3. The government's filings do not explain this discrepancy.

7. Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." 19 C.F.R. § 351.401(h).

Appendix 1

1. On the record here, the Department's decision that the enrichment of uranium feedstock pursuant to "SWU"[8] contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;

2. On the record here, the Department's decision not to apply its tolling regulation to determine whether the Intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;

3. On the record here, the Department's reasons for declining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export price are reasonable and therefore in accordance with law; and

4. On the record here, the Department's interpretation that the statutory countervailing duty provisions reach subsidies that help to defray the costs

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8. A SWU contract is a contract for a "separative work unit," a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium at specified assays. *USEC I*, 27 CIT at __, 259 F.Supp.2d at 1314; *LEU from France*, 66 Fed.Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. *USEC I*, 27 CIT at __, 259 F.Supp.2d 1310, 1314.

of manufacturing imports of LEU is reasonable, and accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law.

We now consider the parties' motions.

Discussion

Title 28 U.S.C. § 1292(d) permits interlocutory appeals, but only where "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and [where] an immediate appeal . . . may materially advance the ultimate termination of the litigation." *Id.* The instant case meets each part of this statutory three-prong test.

First, general issues one and two involve controlling questions of law because, absent further remand, these two issues effectively terminate the country-specific antidumping cases at issue here. Conversely, the decisions on general issues three and four involve controlling questions of law because those decisions permit cases to proceed that would otherwise have been remanded or concluded. Moreover, further proceedings in this Court will not moot these issues, and an incorrect disposition of these issues will require reversal of a final judgment based thereon. *See* 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3930, at 423-24 (2d ed. 1996) ("There is no doubt that a question is

'controlling' if its incorrect disposition would require reversal of a final judgment. . . .").

Second, this is a case of first impression, in an area where the law is complex, and there is undeniably a substantial difference of opinion on each question.

Third, an immediate appeal may materially advance the ultimate termination of this litigation. The four issues decided by the Court define the scope and effect of the remaining questions which may be raised in the underlying fifteen actions, and which remain to be considered. Consequently, the Court's decision on these four issues sets the course for any further proceedings. Absent an immediate appeal, the parties and this Court will spend substantial resources and time on the remaining proceedings before a final appealable judgment can be made. On the other hand, an immediate appeal will significantly expedite proceedings by clarifying the course of the proceedings and enabling the parties and the Court to allocate resources efficiently. Accordingly, the Court finds that the three-prong test set forth in 28 U.S.C. § 1292(d) is satisfied here.

Conclusion

In the circumstances present here, an immediate interlocutory appeal will best serve the interests of all parties and of the judiciary. Therefore, the Court will certify, for intermediate interlocutory appeal, the Court's decision on the four general issues decided in *USEC I* and *USEC II*.

THEREFORE, this action having been duly submitted for decision, and the Court, after due deliberation having rendered a decision upon the issues identified, and no party having sought further remand of the Court's decision, and the Court having determined that these issues involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from this Court's decision may materially advance the ultimate termination of this litigation; now, in conformity with that decision, it is hereby

ORDERED that

1. On the record here, the Department's decision that the enrichment of uranium feedstock pursuant to SWU contracts constitutes a sale, rather than a subcontracting (or "tolling") arrangement, is unsupported by substantial evidence;

2. On the record here, the Department's decision not to apply its tolling regulation to determine whether the intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG"), rather than the "enrichers," should be designated as producers of LEU is not in accordance with law;

3. On the record here, the Department's reasons for declining to apply the tolling regulation in the context of its industry support determination, and thus, its application of a different definition of "producer" from that used in establishing export or constructed export

price are reasonable and therefore in accordance with law; and

4. On the record here, the Department's interpretation that the statutory countervailing duty provisions reach subsidies that help to defray the costs of manufacturing imports of LEU is reasonable, and, accordingly, the Department's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy is in accordance with law; and it is further

ORDERED that the Court finds, pursuant to 28 U.S.C. § 1292(d), that the Court's decision on the four issues stated above involve controlling questions of law with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from the Court's decision may materially advance the ultimate termination of this litigation; and it is further

ORDERED that 28 U.S.C. § 1292(d) hereby permits appeal of these issues.

Donald C. Pogue
Judge

Evan J. Wallach
Judge

Richard K. Eaton
Judge

Dated: December 22, 2003
New York, New York

APPENDIX J — ORDER FOR REMAND OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED JANUARY 5, 2006

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 02-00219.

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÉRES NUCLÉAIRES, AND COGEMA, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

Jan. 5, 2006, Decided

POGUE, Judge

ORDER FOR REMAND

In accordance with the decisions of the United States Court of Appeals for the Federal Circuit in *Eurodif S.A. v. United States*, 411 F.3d 1355(Fed.Cir.2005) (*"Eurodif I"*) and *Eurodif S.A. v. United States*, 423 F.3d 1275

(Fed.Cir.2005) (*"Eurodif II"*), and upon consideration of the parties' filings herein, it is hereby:

ORDERED that the final determination and issuance of an antidumping duty order by the United States Department of Commerce ("Commerce") in *Low Enriched Uranium from France*, 66 Fed.Reg. 65,877 (Dep't Commerce Dec. 21, 2001)(notice of final affirmative antidumping duty determination) *as amended*, 66 Fed.Reg. 6680 (Dep't Commerce Feb. 13, 2002)(notice of amended final determination of antidumping duty order), challenged in Consolidated Court No. 02-00219, is remanded to Commerce for action consistent with the decisions of the Court of Appeals for the Federal Circuit in *Eurodif I* and *II*.

ORDERED that Commerce upon remand shall revise such final determination and order in accordance with the decisions in *Eurodif I* and *Eurodif II*. Commerce shall specifically explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I* and *II*.

ORDERED that Commerce shall file its remand results in Consolidated Court No. 02-00219 with the Court, and serve the parties with same, by **March 3, 2006**. All parties may file and serve responses thereto by **March 17, 2006** thereafter. All parties may file and serve a reply to any responses by **March 31, 2006**; and it is further

ORDERED that all other action in Consolidated Court No. 02-00219 before this Court is stayed pending further notice from the Court.

APPENDIX K — FINAL RESULTS OF REDETERMINATION BY THE DEPARTMENT OF COMMERCE DATED MARCH 3, 2006

Low Enriched Uranium from France
Final Results of Redetermination
Pursuant to Court Remand
Eurodif S.A., et al. v. United States
Consol. Ct. No. 02-00219, Slip Op. 06-2
(January 5, 2006 CIT)

SUMMARY

On January 5, 2006, the U.S. Court of International Trade (CIT) remanded the above-referenced proceeding to the Department of Commerce (Commerce) to revise the final determination (amended) and order in this proceeding in accordance with *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (*Eurodif I*) and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif II). Furthermore, the CIT specifically directed the Department to "explain how its final determination and order on remand has eliminated all SWU transactions as required by *Eurodif I* and *II*." Slip Op. 06-2, at 2.

For these final remand results, we have recalculated the margin for the affiliated respondents in the investigation, Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc. (collectively, Eurodif), excluding all Eurodif sales made pursuant to separative work units (SWU) contracts, thus fulfilling the CIT mandate. As a result, Eurodif's dumping margin is now 23.66 percent and the antidumping duty order will remain in place.

Appendix K

BACKGROUND

On February 6, 2002, Commerce issued an antidumping duty (AD) order on low enriched uranium (LEU) from France. Respondents challenged the determination (and a concurrent countervailing duty determination) arguing that the transactions which involved the enrichment of the uranium (so-called SWU contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to AD law. The CIT ruled against Commerce, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) in *Eurodif I*. The Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, that LEU imported pursuant to SWU contracts was not subject to the AD law. The Federal Circuit based its ruling on *Florida Power & Light v. United States*,[1] despite the fact that a different statute with different purposes was at issue. While the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we have removed all sales made pursuant to SWU contracts from the calculations of this redetermination. We will review the possibility of seeking *certiorari* after final judgement has been rendered in this matter.

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1. 307 F.3d 1364 (Fed. Cir. 2002) (accepting the Department of Energy's argument that, under the Contracts Disputes Act, its SWU contracts constituted purchases of services).

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On January 18, 2006, and January 27, 2006, we received comments from USEC Inc. and United States Enrichment Corporation (collectively, USEC), the U.S. producer of LEU, concerning this remand proceeding. Eurodif submitted comments on January 23, 2006, and January 30, 2006.

On February 7, 2006, we issued draft remand results. On February 13, 2006, we received comments on the draft remand results from Eurodif, USEC, and the Ad Hoc Utilities Group (AHUG). The Department's response to the parties' comments is included in the "Comments" section, below. The Department has not made any changes from the draft remand results.

REMAND ANALYSIS OF SWU TRANSACTIONS

On page 8 of their May 1, 2001, questionnaire response, respondents state that they have "reported 'SWU' for sales of enrichment services, and 'LEU' for sales of enriched uranium," and the databases of sales provided with the questionnaire response contained a field which so identified all reported sales. After removing all SWU sales, we recalculated Eurodif's margin on the sales of LEU. The resulting dumping margin for Eurodif is 23.66 percent, compared to 19.95 percent in the original order. *See Memorandum to Dana Mermelstein from Mark Hoadley, Remand Analysis of French Low Enriched Uranium* (February 7, 2006) for the details of how the calculations and programming changed, and for the revised dumping margins. Because Eurodif's rate is the basis for the "all others" rate, the all others' rate is now 23.66 percent as well.

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COMMENTS

Comment 1: USEC commented that the Department should have sought additional, transaction-specific information regarding the sales under investigation, as USEC proposed in its earlier comments. According to USEC, such information might have demonstrated that certain transactions made pursuant to SWU contracts were for purchases of goods, and were not service transactions "as understood by" the Federal Circuit in *Eurodif I* and *II*.

Commerce's Position: As stated above, while the Department continues to believe that SWU contracts result in the sale of LEU by French producers/exporters to U.S. customers, the CIT's specific remand instructions require the Department to remove sales made pursuant to SWU contracts. The CIT's instructions do not allow for a transaction-by-transaction analysis of each SWU contract or of the broader context of each sale made under these contracts.

Comment 2: Eurodif and AHUG argue the Department must revise the scope of the order to exclude SWU transactions. Eurodif proposes the addition of the following sentence to the scope of the order: "Also excluded from this order is LEU from France imported into the United States for the fulfillment of SWU contracts, provided that any such import is accompanied by the importer's certification to that effect."

Appendix K

USEC claims the scope of an antidumping order is a matter of physical characteristics, and not the nature of sales transactions. Because the LEU entered into the United States unquestionably fits the physical description of the subject merchandise, regardless of whether pursuant to so called "SWU" or "LEU" transactions, argues USEC, the nature of the sales transaction is irrelevant to the scope of the order, and instead pertains to the issue of assessment. USEC argues that all LEU entries are reviewable under the order, but that if the Department were to determine that a sale is not involved in an administrative review (in accordance with *Eurodif I* and *II*), it would simply not order assessment of duties for those entries in order to comply with the courts' decisions. Furthermore, argues USEC, the certification proposed by Eurodif is inadequate, and only an analysis of each contract can determine whether each entry is a sale subject to antidumping law.

Commerce's Position: We agree with USEC that the scope of the order should not be revised in order to address the *Eurodif I* and *Eurodif II* decisions by the Federal Circuit. The term subject merchandise is defined as the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order or a finding. *See* Section 771(25) of the Tariff Act of 1930, as amended. LEU imported into the United States for consumption that meets the description of the merchandise established in the AD order on LEU continues to be subject merchandise. However, pursuant to the *Eurodif I* and *II* decisions,

Commerce will not assess AD duties on imports of LEU sold under SWU transactions. Whether a sale is excludable on the ground that it constitutes a SWU sale is a question that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts. If the contract in question is determined to be a SWU transaction, consistent with *Eurodif I* and *Eurodif II*, Commerce will not include the SWU price in its dumping margin calculation. Based upon the above, Commerce has not revised the scope of the AD order on LEU.

Comment 3: AHUG states that it is disturbed by Commerce's assertion that it disagrees with the Federal Circuit's decision and is contemplating petitioning the Supreme Court for *certiorari*, despite having contemplated (as evidenced by Commerce's requests for extensions of time, it argues) and bypassed the opportunity to seek *certiorari* after the Federal Circuit issued its rehearing decision on September 9, 2005. AHUG argues that the approach being contemplated by Commerce is inconsistent with the objective of the interlocutory appeal process and interjects unnecessary uncertainty into the nuclear fuel market.

Commerce's Position: Commerce's decision concerning a petition for *certiorari* is not relevant to whether our draft redetermination properly fulfills the instructions of the CIT. We disagree with AHUG that Commerce, by leaving open the option of seeking *certiorari*, has acted in a manner inconsistent with the interlocutory appeal

process. As stated above, while Commerce has respectfully complied with the CIT's order, the United States continues to believe that the decisions of the Federal Circuit in *Eurodif I* and *II* are erroneous, and will review the possibility of seeking certiorari after final judgment has been rendered in this matter.

FINAL RESULTS OF REDETERMINATION

For these final results pursuant to the CIT remand, the recalculated weighted-average margins are as follows:

Company	Final Determination and Order	Final Results of Redetermination Pursuant to Remand
Eurodif S.A., Compagnie Generale Des Matieres Nucleaires, and Cogema, Inc.	19.95%	23.66%
All Others	19.95%	23.66%

s/ David M. Spooner
David M. Spooner
Assistant Secretary
for Import Administration

3/3/06
(Date)

APPENDIX L — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED MAY 18, 2006

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 02-00219

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÈRES NUCLÉAIRES AND COGEMA, INC., ET.AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

May 18, 2006, Decided

JUDGES: Before: Donald C. Pogue, Evan J. Wallach, and Richard K. Eaton, Judges

OPINION

Per Curiam: This matter arises after remand pursuant to *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed.Cir.2005) ("*Eurodif I* ") and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed.Cir.2005) ("*Eurodif II*"). In accordance with these decisions, we ordered "that

Commerce upon remand shall revise such final determination and *order* in accordance with the decisions in *Eurodif I* and *Eurodif II*. Commerce shall specifically explain how its final determination *and order on remand has eliminated all SWU transactions* as required by *Eurodif I and Eurodif II*." *Eurodif S.A. v. United States*, 414 F.Supp.2d 1263, 1263, 30 CIT __, __ (2006) (emphasis added) ("*Eurodif III*").

In totality, Commerce in its Final Results of Redetermination Pursuant to Court Remand, recalculated the duty margin by excluding *all* low enriched uranium ("LEU") covered by separative work unit ("SWU") contracts from its margin calculation. *See* Low Enriched Uranium from France: Final Results of Redetermination Pursuant to Court Remand, Consol. Ct. No. 02-00219, Slip Op. 06-02 (January 5, 2006 CIT) at 3 ("Remand Redetermination"). Despite the contrary holdings of *Eurodif I* and *Eurodif II* and the specific instructions of this court, however, Commerce concluded that it will not modify the scope of the antidumping duty order to exclude LEU covered by SWU contracts. *Id.* at 4-5.

Responding to Commerce's conclusion, Eurodif S.A., Cogema, and Cogema, Inc. (collectively "Eurodif") claim that Commerce erred in its Remand Redetermination. Eurodif claims that any LEU covered by SWU contracts should be excluded from the scope of the antidumping duty order. As such, Eurodif asks the court to direct Commerce to amend to:

(1) Liquidate all entries without antidumping duties on LEU imported to fulfill SWU contracts (and therefore refund cash deposits already tendered on such entries);

(2) exclude LEU imported to fulfill SWU contracts from the scope of the order;

(3) cease the suspension of liquidation and any deposit requirement on such entries.

Eurodif's Comments re: Commerce's Final Results of Redetermination Pursuant to Ct. Remand at 13.

Alternatively, Defendent-Intervenors, USEC Inc. and United States Enrichment Corporation (collectively "USEC"), argue that Commerce excluded too many goods from the margin calculation through its failure to investigate the facts behind the SWU contracts. *See* Resp. USEC Inc. & U.S. Enrichment Corp. Final Results of Redetermination Pursuant to Ct. Remand at 3-8 ("USEC's Resp."). Specifically, USEC argues that although the SWU contracts may facially suggest that they cover the provision of services, in fact, in some instances, the title over the uranium used in the process transfers during the transaction, making that transaction a sale of goods. By failing to undertake this investigation, USEC avers, Commerce impermissibly excluded non-service oriented transactions. *Id.* at 4-6. Additionally, USEC argues that Commerce failed to consider whether Cogema and suppliers of uranium ores were affiliated

and, thereby, improperly excluded certain LEU covered by SWU contracts from the dumping margin. *Id.* at 6-8.

We will address each issue.[1]

(1) Failure to re-open the record to investigate the facts behind SWU transactions:

USEC claims that although the contracts in question might be read as service contracts, in some instances, the transactions may really entail the sale of goods under the test enunciated in *Eurodif I* and *II*. *See id.* at 4-6. USEC argues that some transactions involve the enricher's client providing certain feed uranium and receiving from the enricher LEU not made from the uranium the client supplied. *Id.*[2] Under such an

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1. USEC raised methodological issues in its Compliant for which this court reserved judgment. In its papers filed in conjunction with Commerce's Remand Redetermination, USEC has advised the court that it waives these arguments. USEC Resp. at 8. Similarly, Eurodif amended its complaint to withdraw any issues for which this court has reserved judgment. Eurodif's Amendment of Compl. by Consent, April 27, 2007.

2. For example, under USEC's theory, if a person took his or her Hummer® to the carwash and received *a different* (albeit clean) Hummer® back such a transaction would involve the sale of goods, *i.e.*, a new Hummer®. The Hummer® the client initially provides would merely constitute part of the consideration for the new Hummer®. To address such factual circumstances, USEC proposes a test for differentiating those transactions involving the provision of services from those providing the sale

(Cont'd)

arrangement, USEC asserts, title over the feed uranium supplied by the client must transfer to the enrichers, and title over the enricher's uranium (which the client receives back) must revert to the client. Therefore, USEC claims, such arrangements would constitute a sale of goods under the Federal Circuit's *Eurodif I* and *II*.

In its Remand Redetermination, Commerce found that our remand instructions did "not allow for a transaction-by-transaction analysis of each SWU contract or of the broader context of each sale made under these contracts." Remand Redetermination at 3. Rather, Commerce concluded that our order required the exclusion of all LEU covered by SWU contracts regardless of any other factors parties raised regarding the enriching transactions covered by SWU contracts. Therefore, Commerce declined to reopen the record in order to investigate USEC's allegations. *Id.*

(Cont'd)

of goods. It appears that under this test, presumptively SWU contracts will be treated as contracts for the provision of services. This presumption however, could be overcome in instances where (1) "contracts which provide for utilities to deliver natural uranium in less time than necessary to cover the average production and delivery time for LEU imply transactions in which the enricher owns the LEU during the enrichment process" or (2) "the short natural uranium delivery lead time in such contract implies that the enricher effectively conveyed ownership of natural uranium used in the enrichment to the utility when production began." USEC Comments at 4.

We agree with Commerce. The Federal Circuit held in *Eurodif II* that the "inescapable conclusion flowing from [the circumstances present] is that the enrichers do not 'sell' LEU to utilities pursuant to the SWU contracts at issue here." *Eurodif II*, 423 F.3d at 1278. In so holding, *Eurodif II* reaffirmed *Eurodif I's* holding that under "the contracts in this case, it is clear that ownership of either the unenriched uranium or the LEU is not meant to be vested in the enricher during the relevant time periods that the uranium is being enriched." *Id.* (quoting *Eurodif I*, 411 F.3d at 1362). Both *Eurodif I* and *Eurodif II* found that this conclusion was not altered by factual circumstances operating behind the individual contracts at issue here. Significantly, in specifically rejecting the argument USEC raises here, *Eurodif II* held that "[w]hile it is correct that a utility may not receive the LEU that was enriched from the exact unenriched uranium that it delivered to the enricher, it is nevertheless true that up until the sampling and weighing of the LEU before delivery, the utility retains title to the quantity of unenriched uranium that is supplie[d] to the enricher." *Id.* (quoting *Eurodif I*, 411 F.3d at 1362).

Accordingly, the Federal Circuit has already considered this issue and held that the facts/arguments USEC raises in this respect are of no moment. Thus, Commerce's Remand Redetermination on this issue is sustained.

(2) Affiliated Party Feed Purchase Claim

Next, USEC contends that "Commerce's approach failed to examine whether a given SWU transaction in which the natural uranium was supplied by Cogema—a respondent in this case—or an affiliate thereof should be treated as a sale of merchandise." USEC's Resp. at 6. Commerce did not squarely address this issue apparently finding that the remand instructions did not direct it reopen the record on this question.

Commerce is correct. Nothing in this court's remand order pertained to this question. In our original decision *USEC Inc. v. United States*, 27 CIT __, __, 259 F.Supp.2d 1310, 1316 n. 4 (2003), we specifically noted that the record did not indicate that such an affiliation was relevant to Commerce's decision. Commerce chose not to pursue this analysis. *See* Final Remand Determination for *USEC Inc. And United States Enrichment Corporation v. United States*, Court Nos. 02-00112, 02-00113, 02-00114, and Consol. Court Nos. 02-00219, 02-0000221, 02-00227, 02-00229, and 02-00233 Slip. Op. 03-34, (March 25, 2003) at 60. As such, Commerce's Remand Determination now before the court is sustained on this issue.

(3) Scope of the Order

Last, Eurodif argues that we should remand with instructions for Commerce to modify the scope of the antidumping order to exclude LEU covered by SWU contracts. Commerce and USEC concede, as they must,

that when the court finds that the scope of an order improperly extends to certain goods, Commerce must ordinarily revise the antidumping duty order to exclude such goods. Nevertheless, both argue that the order's scope is proper here. Directing the court to 19 U.S.C. § 1677(25), Commerce argues that " 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order under this subtitle. . . ." Because all LEU imported is of the "class or kind of merchandise . . . within the scope of an . . . order," Commerce claims, all LEU must fall within the order. Commerce admits that certain LEU may be excluded from antidumping duties by virtue of the Federal Circuit's holdings in *Eurodif I* and *II*. Nonetheless, Commerce claims that those goods are only excludable on the basis of the non-physical features, *i.e.*, that they are covered under SWU contracts. *See, e.g.*, Def.'s Resp. Parties Remand Cmts. 6-7; *cf.* Remand Redetermination at 5.[3] Non-physical features,

3. Commerce's Remand Redetermination offered minimal justification for declining to modify the scope of its antidumping order. In its entirety, Commerce wrote:

> We agree with USEC that the scope of the order should not be revised in order to address the *Eurodif I* and *Eurodif II* decisions by the Federal Circuit. The term subject merchandise is defined as a class ~~or~~ kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, and order or a finding. *See* Section 771(25) of the Tariff Act of 1930, as amended. LEU imported into the

(Cont'd)

Commerce contends, are not a basis for distinguishing goods from the "class or kind of merchandise" subject to the antidumping duty order. Consequently, Commerce concludes that the adjustments *Eurodif I* and *Eurodif II* require may only be made in an administrative review rather than through modifying the antidumping duty order.

The first flaw with Commerce's argument is that it is circular—LEU produced under SWU contracts are only of the "class or kind of merchandise" covered by the order if Commerce does not modify the order's definition of the "class of kind of merchandise" to exclude such merchandise in compliance with *Eurodif I* and *II*.

(Cont'd)

> United States for consumption that meets the description of the merchandise established in the AD order on LEU continues to be subject merchandise. However, pursuant to the *Eurodif I* and *Eurodif II* decisions, Commerce will not assess AD duties on imports of LEU sold under SWU transactions. Whether a sale is excludable on the ground that it constitutes a SWU sale is a question that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts. If the contract in question is determination to be a SWU transaction, consistent with *Eurodif I* and *Eurodif II*, Commerce will not include the SWU price in its dumping margin calculation. Based upon the above, Commerce has not revised the scope of the AD order on LEU.

Remand Redetermination at 4-5.

Put differently, if the Federal Circuit's decisions direct Commerce to modify the order to exclude LEU covered by SWU contracts, then such imports would not be of the "class or kind of merchandise . . . within the scope of . . . an order." Because the holdings of *Eurodif I* and *II* obligate Commerce to "eliminate[ ] all SWU transactions" from its antidumping duty order, *Eurodif III*, 414 F.Supp.2d at 1263, 30 CIT at __, such merchandise may not be of the "class or kind of merchandise" covered by the antidumping duty order. Therefore, pursuant to these opinions, the scope of the order must be redrawn to exclude LEU covered by SWU contracts from the ambit of the "class or kind of merchandise" covered by the order. *See* 19 U.S.C. § 1673e(a)(2) (the antidumping duty order is to include a description of the subject merchandise). When such a modification is made, LEU covered by SWU contracts will therefore no longer be within the "class or kind" of merchandise covered by the antidumping duty order.

Nor do the terms "class or kind of merchandise" require that differentiations between scope and non-scope merchandise be based only on physical characteristics. To the contrary, in determining whether a given product is within the "class or kind" of merchandise under order, Commerce must take into account "[t]he description of the merchandise contained in . . . the determination[ ] of the Secretary . . . ," 19 C.F.R. § 351.225(k)(1); there is no basis for saying that the "description" must embody only the physical attributes of a product. This conclusion is rendered unavoidable when considered in relation to the other

factors of which Commerce may take into account (besides a product's physical characteristics) when considering the scope or an antidumping duty order, namely: (1) the expectations of the ultimate purchaser; (2) the ultimate use of the product; (3) the channels of trade in which the product is sold; and (4) the manner in which the product is advertised and displayed. 19 C.F.R. § 351.225(k)(2); *see also Diversified Prods. Corp. v. United States*, 6 CIT 155, 572 F.Supp. 883 (1983). Consequently, there is a strong basis for an antidumping duty order's differentiation between products based on "non-physical" attributes.

Relatedly, Commerce's assertion that whether a product falls within the scope of an order is something "that must be determined in the context of an administrative review by the administering authority analyzing the terms and conditions of the contract, and the parties' performance of such contracts," Remand Redetermination at 5, is unavailing. Commerce is correct in that it "is responsible for interpreting the antidumping duty order and determining whether certain products fall within the scope of the order as interpreted." *Ericsson GEMobile Commnc'ns, Inc. v. United States*, 60 F.3d 778, 783 (Fed.Cir.1995). But this does not mean that the administrative review is the proper forum to address whether merchandise is within the scope of an order. Rather, when a question regarding the scope of an antidumping duty order arises as it pertains to a specific import, Commerce may, for example, "initiate an inquiry" as to whether a given product falls within the scope of an order, 19 C.F.R. § 351.225(b); additionally,

"any interested party may apply [to Commerce] for a ruling as to whether a particular product is within the scope of an order or a suspended investigation." 19 C.F.R. § 351.225(c). During such a "scope determination," liquidation is suspended on the products at issue, 19 C.F.R. § 351.225(*l*)(2); following a scope determination, any interested party may seek judicial review of Commerce's determination under 19 U.S.C. § 1516a(2)(B)(vi). *See Sandvik Steel Co. v. United States*, 21 CIT 140, 143, 957 F.Supp. 276, 278 (1997) *aff'd Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed.Cir.1997). As such, Commerce has a mandated procedure, apart from the administrative review, to make such fact intensive/product specific determinations. Accordingly, Commerce's own regulations belie its assertion that an administrative review is the proper forum to raise such objections. Indeed, nothing in the antidumping statute precludes correction of the order in accordance with the holdings of the Federal Circuit issued here. As noted above, Commerce here is required to "specifically explain how its final determination *and order on remand has eliminated all SWU transactions* as required by *Eurodif I and II.*" *Eurodif III*, 414 F.Supp.2d at 1263, 30 CIT at __ (emphasis added).

Appendix L

CONCLUSION

According to the discussion above, Commerce's Remand Redetermination not to re-open the record to further investigate the SWU transactions at issue here is sustained; Commerce's Remand Redetermination with respect to the scope of the order is remanded. On remand Commerce shall address Eurodif's objections in accordance with this opinion and the Court's order in *Eurodif III*. Commerce shall have until June 19, 2006 to provide a remand determination. Parties shall submit comments on Commerce's remand determination no later than June 26, 2006 and rebuttal comments no later than July 7, 2006.

APPENDIX M — FINAL RESULTS OF REDETERMINATION BY THE DEPARTMENT OF COMMERCE DATED JUNE 19, 2006

Low Enriched Uranium from France
Final Results of Redetermination
Pursuant to Court Remand
Eurodif S.A., et al. v. United States
Consol. Ct. No. 02-00219, Slip Op. 06-75
(May 18, 2006 CIT)

SUMMARY

On January 5, 2006, the U.S. Court of International Trade (CIT) remanded the above-referenced proceeding to the Department of Commerce (Commerce or Department) to revise the final determination (amended) and order in this proceeding in accordance with *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir. 2005) (*Eurodif I*) and *Eurodif S.A. v. United States*, 423 F.3d 1275 (Fed. Cir. 2005) (Eurodif II). Pursuant to that remand (*Eurodif S.A. v. United States*, Slip Op. 06-2 (Jan. 5, 2006 CIT) *(Eurodif III)*), on March 3, 2006, Commerce submitted to the CIT its Final Results of Redetermination Pursuant to Court Remand, recalculating the dumping margin by excluding all low enriched uranium (LEU) covered by separative work unit (SWU) contracts from our calculation. On May 18, 2006, the CIT again remanded this matter to Commerce, stating that we should amend the scope of the order and address the objections of Eurodif, S.A., AREVA NC and AREVA NC Inc. (formerly COGEMA and COGEMA Inc.) (collectively, Eurodif). The CIT otherwise sustained

Appendix M

Commerce's March 3 Remand Redetermination. *Eurodif S.A. v. United States*, Slip Op. 06-75 (May 18, 2006 CIT) *(Eurodif IV)*.

In accordance with the Court's instructions, we have amended the scope of the order, and we have addressed the objections of Eurodif to our prior remand. We have also outlined the method we intend to use to ensure entries are properly excluded from this order in accordance with the decisions of the courts.

BACKGROUND

On February 13, 2002, Commerce published an antidumping duty (AD) order on LEU from France. Respondents challenged the determination arguing that the transactions which involved the enrichment of the uranium (so-called SWU contracts) did not constitute sales of goods, but rather should have been considered service transactions which are not subject to AD law. The CIT agreed, and the case was appealed to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). In *Eurodif I* and *II*, the Federal Circuit ruled that SWU contracts constitute sales of enrichment services, not goods, and, therefore, LEU imported pursuant to SWU contracts was not subject to the AD law. While the Department respectfully disagrees with the conclusion that SWU contracts do not result in the sale of LEU by French producers/exporters to U.S. customers, consistent with the Court's specific remand instructions, we removed all sales made pursuant to SWU contracts from the calculations of the March 3

remand redetermination and we have expressly excluded such merchandise from the scope of the antidumping duty order in the present remand redetermination. For purposes of the present remand redetermination, Commerce is implementing the holdings of *Eurodif I* and *II* as instructed by the CIT in *Eurodif III* and *IV*. We will review the possibility of seeking *certiorari* after final judgement has been rendered in this matter.

EURODIF IV

For the reasons set forth in Commerce's March 3, 2006 Remand Redetermination and the United States' March 31, 2006 Response to Parties' Remand Comments, we respectfully disagree with the Court's conclusion in *Eurodif IV* that *Eurodif I* and *II* cannot be implemented without amending the description of the scope of the antidumping order. In accordance with the Court's remand order, we are hereby amending the scope of the order to exclude LEU sold pursuant to SWU contracts and we address below the objections raised by Eurodif to the Court in its comments on the March 3, 2006 Remand Redetermination.

AMENDED SCOPE

Pursuant to the CIT's order in *Eurodif IV*, we hereby amend the scope of the AD order on LEU from France to include the following language:

> Also excluded from the scope of this order is LEU produced and imported pursuant to a

> separative work unit ("SWU") transaction. For purposes of this exclusion, a SWU transaction means a transaction in which the parties only contract for the provision of enrichment processing, and the purchasing party is responsible for the provision of natural uranium feedstock to the enricher. At no time, before, during or after enrichment, does the enricher own or hold title to the LEU product delivered under the contract. In order to qualify for the exclusion, the SWU transaction must be performed in accordance with the relevant terms of a written contract for the provision of SWU. Entries pursuant to such SWU transactions must be accompanied by the certification of the end user and enricher.

The certification we will instruct U.S. Customs and Border Patrol (CBP) to require from the utility and enricher upon entry is attached to this redetermination. We will also require that copies of these certifications be filed with the Department of Commerce, and that each certification form filed with the Department include the corresponding entry date and number.

COMMENTS FROM PARTIES

On June 7, 2006, USEC submitted comments for Commerce to consider in this redetermination. It also submitted a suggested amendment to the scope description, and a proposed certification form. USEC's scope language, proposed certification form, and

arguments address what it views as the four essential issues to be resolved in this redetermination:

1. Defining a SWU transaction by specifying the necessary elements thereof;

2. How these necessary elements should be certified, and who should certify;

3. How Commerce can confirm the accuracy of a certification; and,

4. The type of security needed, if any, between the time of entry and the confirmation of the certification.

After considering USEC's submission, we have concluded the amended scope language stated above and the attached certification form meet the remand requirements. USEC attempts to define the necessary elements of a SWU transaction. Using the elements it identifies, it proposes amended scope language that not only excludes SWU transactions from the scope of the order, but also provides an extended definition of what constitutes a SWU transaction. Similarly, USEC proposes a certification form that it also drafted around the necessary elements it identified. However, the proposed elements appear to be simply an elaborate way of describing the one fact the Federal Circuit found crucial in this case concerning whether a contract is for the provision of a good or service: namely, the transfer of title. For example, in *Eurodif I*, the Federal Circuit

stated that "the SWU contracts in this case do not evidence any intention by the parties to vest the enrichers with ownership rights in the delivered unenriched uranium or the finished LEU. As a result, the 'transfer of ownership' required for a sale under NSK is not present here." *Eurodif I*, 411 F.3d at 1362 (referring to *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997)). Similarly, in *Eurodif II*, the Federal Circuit referred to the "critical importance of the indisputable fact that, pursuant to the contracts at issue in this case, enrichers never obtain ownership of either the feed (unenriched) uranium during enrichment or the final low enriched uranium ('LEU') product." *Eurodif II*, 423 F.3d at 1278.

It is not merely that the Federal Circuit cites the importance of possession of title as the first among many elements indicating that SWU contracts are contracts for services and not for goods, but, in fact, the Federal Circuit indicates almost no concern with any of the other facts involved in the Eurodif transactions at issue. The remaining elements noted by USEC are mentioned either incidentally in the Federal Circuit's opinions, or not at all. While some of these elements are discussed by the CIT in its opinions, that court also offers a clear statement of its reasoning,[1] and it is not necessary to

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1. *See, e.g., USEC Inc. and United States Enrichment Corporation*, 281 F. Supp. 2d 1334,1340 (Sept 16, 2003 CIT) ("Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise . . . .").

rely on the sampling of court statements collected by USEC in order to form a definition of a SWU transaction.

In so far as some of the factors cited by USEC might relate to evidence that a transaction is only a SWU transaction on its face, but in terms of performance is actually for the sale of LEU, the amended scope language addresses this concern by requiring that the transaction be performed in accordance with the terms of the written contract. Commerce recognizes that it cannot predict how the written terms and actual performance of contracts certified as "SWU transactions" may differ from the circumstances to which *Eurodif I* and *II* apply. Accordingly, in subsequent proceedings, such as the scope inquiry suggested by the Court, Commerce may determine that it is necessary to provide additional clarification of the scope of this order to further define the meaning of "SWU transaction" in accordance with *Eurodif I* and *II* and to modify the form of the required certification as circumstances warrant.

Because performance of a transaction might not match the terms of an underlying contract, and because the structure of these transactions and the terms of the underlying contracts might change over time, the Department has included requests for certain facts in its certification form. These facts are relevant to some of the elements of a SWU contract identified by USEC, and we find that these requests for information do not place a significant burden on the end user and enricher who must provide such certifications. Answers provided to these questions are intended to assist Commerce in

determining whether a scope inquiry is warranted or whether additional information should be requested.

Regarding USEC's suggestion that we outline a procedure for confirming the accuracy of Eurodif's certifications, we do not think that any procedures beyond the scope inquiries and administrative reviews that USEC can already request are necessary. We do not believe that there would be sufficient time to review relevant documentation before the merchandise enters U.S. customs territory, and therefore to approve of an entry's classification ahead of time, following a procedure similar to that used in suspension agreements. Moreover, given the Court's decision instructing Commerce to specifically exclude from the scope imports of LEU sold through SWU transactions, the Department has limited authority to instruct CBP to suspend liquidation on ostensibly out-of-scope merchandise until the Department has an opportunity to conduct an administrative proceeding after the merchandise has already been entered.

On June 13, 2006, Eurodif submitted objections to USEC's comments. According to Eurodif, by urging the Department to provide an extensive definition of a SWU contract and a corresponding certification form based on the definition, USEC is making an untimely attempt to reassert arguments the CIT and Federal Circuit have rejected previously regarding how to define a SWU contract as narrowly as possible. Eurodif proceeds to examine each of USEC's proposed elements on a point-by-point basis, arguing that each has been dismissed by

the courts previously or is not relevant to what the courts have emphasized in defining a SWU contract. According to Eurodif, the courts' emphasis has been on what the customer paid for: processing. Eurodif also argues that the Department has no authority to suspend entries of out of scope merchandise, and rebuts arguments made by USEC and Commerce (in our prior remand redetermination) that it is inappropriate to amend the language of the scope of this order.

We agree with Eurodif that USEC's proposed defining elements of a SWU transaction misconstrue the focus of the court's reasoning. As discussed above, we agree that the focus of the courts' reasoning has been that in a SWU transaction the enricher does not take title to the merchandise. We think our attached certification also reflects Eurodif's formulation of this focus: that SWU transactions provide for the payment of uranium processing, and nothing else, other than incidentals. Likewise, the certification does not attempt to define a SWU transaction using any other elements. We also agree that it would be inappropriate to attempt to suspend liquidation of entries certified as out of scope. We do not think it is necessary to offer sur-rebuttal regarding Eurodif's comments on our arguments in *Eurodif III* that it is inappropriate to amend the language of the scope in this case, as we were not asked by the Court in *Eurodif IV* to do so.

On one particular point, however, we disagree with Eurodif. We believe it is appropriate to require both the enricher and utility customer to complete the attached

certification. As this Court has stated, the LEU entering the United States pursuant to SWU contracts is identical in all physical respects to LEU that actually has been purchased in France and imported. Thus, the Department must devise a procedure that can be used by CBP and the Department to determine whether an entry is or is not covered by the scope of the antidumping duty order. The only parties who have the documentation necessary to demonstrate that an entry meets the requirements of a SWU transaction are the utility, which retains title to the feedstock as well as the LEU, and the enricher, which fulfills the terms of the SWU contract by processing the feedstock into LEU. Only both of these entities together can demonstrate that the LEU entering the United States is not subject to the antidumping duty order, since these are the two parties who are signatories to the very contracts that cause this merchandise to fall out of the scope.[2] Because it is only the utility and the enricher who can certify that the entry is being made pursuant to a SWU contract, and because there is no other way for CBP to be able to determine at the point of entry whether the LEU from France is or is not subject to antidumping duties, this certification is essential. The certification is the only vehicle through which CBP and the Department can implement, at the point of entry, the Court's decision to exclude LEU imported pursuant to SWU contracts from the scope of the order. In addition, the certification is not burdensome. A similar certification requirement is being

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2. In this case, the enricher's parent has been the actual signatory to the contract.

applied to handle another exclusion from the scope of the antidumping duty order and there is no evidence that the certification is burdensome to the parties.

On June 13, 2006, the Ad Hoc Utilities Group (AHUG) also responded to USEC's comments. AHUG argues, as Eurodif does, that USEC's attempts to define SWU transactions do not match the statements of the courts. As stated, we do not believe the same can be said of our amended scope language and certification form. AHUG also argues that it is improper to "look behind the enrichment contract" at the factual circumstances of the transactions' performance. We believe that the statements by the courts it cites on this issue refer to previous fact-based arguments made by USEC and the Department (*e.g.*, regarding affiliated parties and the timing of feedstock delivery compared to the final product) and do not preclude examining the future performance of contracts to ensure that parties' performance matches the relevant terms of those contracts. AHUG also argues that no special proceedings are needed to confirm the parties' certifications and that we should not suspend liquidation on SWU transactions. As stated elsewhere in this redetermination, we agree with these conclusions.

On June 15, 2006, USEC submitted additional comments in response to those of Eurodif and AHUG. The Department was unable to consider these comments submitted two business days before this remand redetermination was due at the CIT. Consequently, the Department also did not consider comments filed by

Eurodif on June 16, 2006, rebutting USEC's June 15th comments.

EURODIF'S OBJECTIONS TO COMMERCE'S PRIOR REMAND REDETERMINATION

Eurodif asked the Court to direct Commerce to:

(1) Liquidate all entries without regard to antidumping duties on LEU imported to fulfill SWU contracts (and therefore refund cash deposits already tendered on such entries);

(2) Exclude LEU imported to fulfill SWU contracts from the scope of the order; and,

(3) Cease the suspension of liquidation and any deposit requirement on such entries. If the Court affirms this remand redetermination and such judgment becomes final and conclusive, LEU imported pursuant to SWU transactions will thereby be removed from the scope of the order as described above and Commerce will instruct CPB to cease suspension of liquidation of such entries, and to liquidate such entries without regard to antidumping duties. At such time, with respect to any prior entries not then under the jurisdiction of the courts, Commerce intends to issue instructions for CBP to refund cash deposits on entries of LEU subsequently certified as having entered pursuant to a SWU transaction, cease suspension of liquidation, and liquidate such entries without regard to antidumping duties. Thus, CBP will require the attached certification

from any party claiming such an exclusion, termination of existing suspension, or refund of security. Accordingly, this remand redetermination addresses all of Eurodif's objections to Commerce's March 3, 2006 remand redetermination.

FINAL RESULTS OF REDETERMINATION

Upon final and conclusive court decisions, Commerce will amend the scope of this order to include the language provided above. Commerce will instruct CBP to cease the suspension of liquidation and any deposit requirements on entries of LEU produced pursuant to SWU contracts, and to refund deposits already collected. Commerce will also instruct CBP to require the attached certification from any party claiming such an exclusion, termination of existing suspension, or refund of security.

s/ David M. Spooner
David M. Spooner
Assistant Secretary
for Import Administration

6/19/06
(Date)

Appendix M

ATTACHMENT: CERTIFICATION TO BE REQUIRED BY CBP UPON ENTRY

CERTIFICATION FOR ENTRIES OF LOW ENRICHED URANIUM (LEU) FROM FRANCE MADE PURSUANT TO SEPARATIVE WORK UNITS CONTRACTS

DOC Case Number: (*Nine digit case number*)
Entry Date:
Entry Number: (*For copy filed with DOC*)

_____ ("Utility") and _____("Enricher")
(*Name of utility*) (*Name of enricher*)
hereby jointly certify as follows:

1. On _____, 200__, Utility placed an order for the purchase of separative work units ("SWU") with Enricher. Attached are (i) a copy of the order issued by Utility; (ii) the contract for enrichment processing between Utility and Enricher pursuant to which the order was issued; and, (iii) any applicable certificate of the quantity and quality (CQQ) and any applicable nuclear material accountability document (*e.g.*, DOE/NRC 741) for the LEU being imported. These documents are labeled Attachment A, B, and C, respectively.

2. Utility has delivered or will deliver _____ KgU of unenriched natural uranium to Enricher's facility for enrichment on ____, 200__, and Utility retains

title to the unenriched natural uranium prior to sampling and weighing of the LEU before delivery pursuant to the purchase order.

3. Enricher produced _____ KgU of LEU (the "Excluded Merchandise") conforming to the product assay specified in Utility's order.

4. The following cylinders of the Excluded Merchandise are being imported pursuant to the purchase order:

Cylinder No.	Quantity	Assay

5. At no time during or after enrichment did Enricher own the Excluded Merchandise.

6. Utility and Enricher have performed and will perform the transaction pursuant to which this entry is made in accordance with the relevant terms of the attached contract and will inform U.S. Customs and Border Protection and the Department of Commerce, in writing, if the performance of the contract deviated from its written terms.

7. If any fees were paid to Enricher by Utility in connection with Excluded Merchandise in addition to the fee paid for enrichment processing, please describe the amount and purpose of those fees.

Appendix M

On behalf of Utility	Date
Title	
Address	
Contact Information	
On behalf of Enricher	Date
Title	
Address	
Contact Information	

APPENDIX N — OPINION OF THE UNITED STATES COURT OF INTERNATIONAL TRADE DECIDED AUGUST 3, 2006

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 02-00219

EURODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÈRES NUCLÉAIRES AND COGEMA, INC., ET.AL.,

Plaintiffs,

v.

UNITED STATES,

Defendant.

August 3, 2006

JUDGES: Before: Pogue, Wallach, and Eaton, Judges.

JUDGMENT

PER CURIAM

On May 18, 2006, we remanded the captioned case to the Department of Commerce ("Commerce") to exclude low enriched uranium enriched under so-called separative work unit contracts from the scope of the

antidumping duty order. *See Eurodif S.A. v. United States*, 30 CIT __, __, 431 F.Supp.2d 1350 (2006). Commerce has since filed a remand determination; the parties have commented thereon. Upon review of that determination, and the parties' comments and rebuttals thereto, we find that Commerce has complied with our remand order. We understand the parties' technical comments on the language of the order and the certification that importers will have to complete upon the entry of low enriched uranium. These technical objections, however, would be better addressed in the context of a concrete dispute over a specific entry. *Cf. Nat'l Park Hospitality Ass'n v. DOI*, 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003); 19 C.F.R. § 351.225 (outlining the procedure for "scope" determinations). Therefore, it is hereby:

ORDERED that the Department of Commerce's remand determination is sustained.